TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 106.

THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK AND C. W. SMITH, RECEIVER OF THE PROPERTY OF THE ATLANTIC AND PACIFIC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED MAY 1, 1897.

(16,578.)

(16,578.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 368.

THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK AND C. W. SMITH, RECEIVER OF THE PROPERTY OF THE ATLANTIC AND PACIFIC RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1897.

1 In the Supreme Court of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*

In the Matter of the Intervening Petition of THE TERRITORY OF NEW MEXICO, Appellee.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, Receiver of the Property of the Atlantic & Pacific Railroad Company, Appellants.

Be it remembered that heretofore, to wit, on the 17th day of July, 1896, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of the record in a certain cause lately pending in the second judicial district court of said Territory wherein The United States Trust Company of New York was complainant and Atlantic and Pacific Railroad Company *et al.* were defendants, in the matter of the intervening petition for the Territory of New Mexico; which said transcript is in the words and figures following, to wit:

2 In the Supreme Court of the Territory of New Mexico.

Appeal from the district court within and for the second judicial district of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC & PACIFIC RAILROAD COMPANY *et al.* } No. —.

In the Matter of the Intervening Petition of THE TERRITORY OF NEW MEXICO, Appellee.

UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, Receiver of the Property of the Atlantic & Pacific Railroad Company, Appellants.

Transcript of Record.

C. N. Sterry, solicitor for appellants.
Thomas N. Wilkerson, solicitor for Territory of New Mexico, appellee.

3 Be it remembered that heretofore, to wit, on the 26th day of June, 1896, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States, a stipulation of the respective parties in the matter of the intervening petition of the Territory of New Mexico for an order on the receiver appointed in the case of the United States Trust Company of New York against the Atlantic and Pacific Railroad Company, to pay taxes, as to what should constitute the record on appeal from the judgment and de-

cree of the court requiring the said receiver to pay said taxes, which said stipulation is in the words and figures following, that is to say:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising Under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant, *vs.* ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants. } No. 1122.

In the Matter of the Intervening Petition for THE TERRITORY OF NEW MEXICO.

4 *Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto, as follows:

First. That the Territory of New Mexico, through its solicitor, Thomas N. Wilkerson, district attorney of Bernalillo county, in said Territory, waives the service upon it of any notice or citation upon appeal, and enters its appearance in the said appeal, both in the district court and the supreme court of the Territory when the transcript on appeal shall be filed there.

Second. It is agreed between the parties that the following papers shall constitute the transcript of the record in this cause for the purpose of hearing the appeal therein:

The bill of complaint filed by the complainant, and a copy of the order appointing C. W. Smith receiver in the above-entitled cause.

The intervening petition filed in said cause on behalf of the Territory of New Mexico.

The order to show cause issued thereon with the proof of service.

The answer of the complainant, The United States Trust Company, to the intervening petition.

The answer of the receiver, C. W. Smith, to the intervening petition.

The agreed statement of facts upon which the hearing was had, and a copy of the exhibits attached to the intervening petition, and a copy of the exhibits attached or referred to in each of the answers, and a copy of the exhibits attached to the agreed statement of facts, provided, however, that whenever the exhibits above referred to are duplicates, only one copy need be placed in transcript coupled with the statement of the clerk of the district court that such other exhibits omitted are duplicates and are omitted on that account.

5 A copy of the decision of Judge Collier, and a copy of the final decree, and a copy of this stipulation.

F. B. JENNINGS,
Solicitor for Complainant.
C. N. STERRY,
Solicitor for Receiver.
THOS. N. WILKERSON,
Solicitor for New Mexico.

Be it remembered that heretofore, to wit, on the 16th day of July, 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States a bill of complaint which said bill of complaint is in the words and figures following, to wit:

6 In the District Court of the Second Judicial District of the Territory of New Mexico for the trial and Hearing of Causes Arising under the Constitution and laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
against
ATLANTIC AND PACIFIC RAILROAD COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company, and The Boston Safe Deposit and Trust Company, Defendants. } In Equity.

7 *Bill of Complaint.*

To the Honorable Needham C. Collier, judge of the district court of the second judicial district of the Territory of New Mexico:

Your orator United States Trust Company of New York, a corporation duly created by and under the laws of the State of New York and a citizen of the said State, having its principal office and place of abode in the city of New York, brings this, its bill, by leave of the court first had and obtained, against Atlantic and Pacific Railroad Company, a corporation created, organized and existing under and by virtue of the laws of the United States of America, and having its principal office and place of abode at Albuquerque, in the Territory of New Mexico; the Atchison, Topeka and Santa Fe Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the Territory and State of Kansas, and having its principal office and place of abode in and being a citizen and resident of said State; the St. Louis and San Francisco Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and having its principal office and place of abode in and being a citizen and resident of the said State; Aldace F. Walker, as receiver, a citizen of

the State of Illinois, and having his place of abode at Chicago, in said State; John J. McCook, as receiver, a citizen of the State of New York, and having his place of abode in the city of New York, in the said State; Joseph C. Wilson, as receiver, a citizen of the State of Kansas, and having his place of abode at Topeka, said State; the Mercantile Trust Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office and place of abode in the city of New York, in said State; and the Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the State of Massachusetts, and a cit-
8 izen of said State, having its principal office and place of abode at Boston, in said State; and thereupon your orator complains and says:

First. Your orator is a corporation, bearing the corporate name of United States Trust Company of New York, duly created and existing under the laws of the State of New York, and is a citizen of said State, and has its principal office and place of business in the city of New York, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust as hereinafter fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter described.

Second. That the defendant, Atlantic and Pacific Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the United States of America, to wit, an act of Congress approved July 27, 1866, being a public act to which your orator prays leave to refer as a part of this bill, as fully as though incorporated in the body thereof; and the acts of Congress supplementary thereto and amendatory thereof, including particularly an act approved April 20, 1871, to which your orator prays leave to refer as part of this bill, as fully as though incorporated in the body thereof.

Third. That the defendant, Atlantic and Pacific Railroad Company, duly complied with the provisions of said acts of Congress, and became and was thereby duly authorized and empowered to and did thereafter construct or acquire by purchase or lease, and operate and maintain the railroads and other property hereinafter mentioned.

Fourth. That in order to secure the bonds to be issued by it, said defendant Atlantic and Pacific Railroad Company, on or about
9 the 1st day of July, 1880, being thereunto by law in all respects duly authorized, and due corporate action having been had, made, executed and delivered to your orator as trustee a certain mortgage or deed of trust called the Western Division first mortgage of said defendant, bearing date the 1st day of July, 1880, in and by which it conveyed to your orator as trustee all and singular its railway and property, real, personal and mixed, and all franchises of every kind or description and wheresoever situated, then or thereafter composing or pertaining to that part of the railroad and telegraph line of said defendant known as the Western division, by the following description (the words "party of the first part," referring to said

defendant, and the words "party of the second part," referring to your orator,) to wit:

"The franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to
10 said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging, or in anywise appertaining, and also all the estate right, title, interest, property, possession, claim, and demand whatsoever, both in law and equity, of the party of the first part of, in and to the same, and any and every part thereof, with the appurtenances."

That since the execution of said Western Division first mortgage said defendant Atlantic and Pacific Railroad Company has acquired a large amount of railroad, engines, cars and other equipment and other personal property, and a large amount of real estate and interests in and rights to real estate, all of which became and are subject to the lien of said mortgage, and the said mortgage is and remains a valid and subsisting lien upon all the property described therein, and upon said subsequently acquired property, and upon all the property, rights and franchises granted to and conferred upon the said Atlantic and Pacific Railroad Company by the acts of Congress hereinbefore mentioned or subsequently acquired thereunder.

Fifth. That being thereunto by law in all respects duly authorized, and due corporate action having been had, and under and in accordance with the provisions of said Western Division first mortgage, said defendant Atlantic and Pacific Railroad Company, on and subsequently to said 1st day of July, 1880, made, executed and delivered its bonds, all bearing date on that day, to an amount not exceeding $25,000 a mile, and amounting in the aggregate to $16,000,000, as follows, viz:

(a.) 15,950 coupon bonds, each for the sum of $1,000, amounting in the aggregate to $15,950,000, in and by each of which bonds the said defendant Atlantic and Pacific Railroad Company promised to pay to your orator, as trustee, or to the bearer thereof
11 on the 1st day of July 1910, at the agency of the railroad company in the city of New York, the sum of $1,000 in gold coin of the United States of America, and also to pay interest thereon

at the rate of six per cent. per annum in like gold coin semi-annually on the first days of January and July in each year, at the agency of said company in the city of New York, on presentation as they severally became due of coupons for such interest annexed to said bonds and payable to bearer.

(*b.*) Ten registered bonds each for the sum of $5,000, and amounting in the aggregate to $50,000, in and by each of which bonds the said defendant, Atlantic and Pacific Railroad Company, promised to pay to your orator, as trustee, or to the registered holder thereof, the sum of $5,000 on the 1st day of July, 1910, in gold coin of the United States of America, at the agency of the railroad company in the city of New York, and also to pay interest thereon at the rate of six per cent. per annum in like gold coin semi annually on the first days of January and July in each year, at the agency of the railroad company in the city of New York.

Sixth. That all of said bonds, amounting in the aggregate to $16,000,000 of principal, were duly issued by said defendant, Atlantic and Pacific Railroad Company, and authenticated by the certificate thereon signed by your orator in accordance with the provisions of said bonds and of said Western Division first mortgage or deed of trust, and were duly negotiated and delivered for value prior to the defaults hereinafter mentioned; and all of said bonds are now outstanding and are valid obligations of said defendant, Atlantic and Pacific Railroad Company. That
12 a true copy of said Western Division first mortgage, dated July 1, 1880, inwhich are set forth true copies of said coupon bonds and of said registered bonds, is hereto annexed marked "Exhibit A," and your orator prays that the same may be taken as part of this bill of complaint as fully as though incorporated in the body thereof.

Seventh. That prior to the making and issue of the said Western Division first mortgage six per cent. bonds, the defendants, Atchison, Topeka and Santa Fe Railroad Company, and St. Louis and San Francisco Railway Company, acquired the control of the defendant Atlantic and Pacific Railroad Company, through the purchase and ownership of a majority of its capital stock; that the said bonds were issued and disposed of for the purpose of completing the line of railroad of the Atlantic and Pacific Railroad Company, known as its Western division, from Albuquerque, on the Rio Grande river, in the Territory of New Mexico, to The Needles, on the Colorado river, on the boundary of the State of California, in order to form, with the railroads of the said Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company a through line to the Pacific coast, and that for good and valuable considerations, as additional security for the payment of the principal and interest of the said bonds, the said Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company on the 1st day of July, A. D. 1880, made and executed an agreement whereby they severally covenanted and agreed with the Atlantic and Pacific Railroad Company and your orator,

as trustee of said mortgage, that if the earnings from the said Western division should prove insufficient to pay all coupons on said bonds as they matured, they would contribute ratably
13 for the purpose of paying and cancelling the same, such sum as might be necessary for the purpose, from their respective earnings upon all business arising from and delivered to said Western division, not exceeding twenty-five per cent. of the gross amount of their said described earnings. That a copy of said agreement of guaranty is hereto annexed marked "Exhibit B," and your orator prays that the same may be taken as a part of this bill of complaint, with the same effect as if fully incorporated in the body thereof.

Eighth. That on or about the 1st day of October, 1880, the said defendant Atlantic and Pacific Railroad Company made, executed and delivered to the said defendant, The Boston Safe Deposit and Trust Company, as trustee, a certain mortgage, or deed of trust, known as its income mortgage, bearing date on that day, in and by which it agreed with the said trustee to make up and furnish to said trustee from time to time a fair and just account of payments and expenses and gross and net earnings of said Western division for the six months ending on each first day of January and July in each year, so as to exhibit the true sum applicable to the payment of interest on the income bonds referred to in said trust deed, and to pay the said interest or so much thereof as has been earned on the first days of April and October in each year. That the said indenture was made for the purpose of securing the payment of the principal and interest of bonds to be issued under the said indenture to an amount not exceeding $18,750 a mile of completed road, and that, as your orator is informed and believes, such income bonds have been issued thereunder and are now outstanding to an amount in the aggregate of $12,000,000. But your orator charges that the lien and obligation of the said bonds against the defendant Atlantic and Pacific Railroad Company and its property, if any, are inferior and subordinate to the lien and obliga-
14 tion of the bonds secured by the said Western division first mortgage.

Ninth. That on or about the first day of September, 1887, the said defendant Atlantic and Pacific Railroad Company, made, executed and delivered unto the defendant, The Mercantile Trust Company, its certain second mortgage or deed of trust upon the said Western division, bearing date on that day, in and by which it conveyed to the said Mercantile Trust Company, as trustee, the property in said mortgage described, being the same property previously conveyed by the said Western division first mortgage as hereinbefore described. That the said mortgage was made to secure the due payment of the principal and interest of bonds known as second-mortgage six per cent. guaranteed gold bonds of the Atlantic and Pacific Railroad Company, Western division, limited to $10,000 a mile of completed railroad of the Western division of said railroad company, to be guaranteed severally, but not jointly, as to the payment of one-half of the principal and interest by the Atchison, Topeka and Santa Fe Railroad Company and as to the payment of one-half

of the principal and interest by the St. Louis and San Francisco Railway Company, which said last-named two companies joined in the execution of the mortgage above set forth as guarantors of the payment of said principal and interest; which said bonds were each for the principal sum of $1,000, payable on the 1st day of September, 1907, and to bear interest at the rate of six per cent. per annum, payable semi-annually on the first days of March and September in each year, at the agency of said railroad company in the city of New York.

That of the bonds authorized to be issued under and
15 to be secured by said mortgage or deed of trust, the defendant Atlantic and Pacific Railroad Company has made and issued, as your orator is informed and believes, second-mortgage six per cent. guaranteed gold bonds for the principal sum of $5,600,000, of which, $5,500,000 are now actually outstanding, and all, or the greater part of which, were taken by the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company as security for, or in payment of, debts claimed to be due to them from the Atlantic and Pacific Railroad Company, and such bonds are now held by them. That the lien and claim of the said second-mortgage six per cent. guaranteed gold bonds upon the railroad and property of the defendant Atlantic and Pacific Railroad Company, if any, are expressly subject, subordinate and inferior to the lien of the Western Division first mortgage hereinbefore referred to.

Tenth. That on each of the first days of January and July, 1894, and January and July, 1895, the holders of said Western Division first-mortgage six per cent. bonds to the amount of $16,000,000, were entitled to collect and receive from said defendant Atlantic and Pacific Railroad Company, the interest falling due on said bonds on each of said first days of January and July in each of said years respectively, being the semi-annual installments of interest due on each of said bonds on said dates; but the said defendant Atlantic and Pacific Railroad Company made default in the payment of said interest; and said semi-annual installments of interest falling due on the said dates respectfully, together with certain interest previously due on said bonds, remain wholly due and unpaid.

Eleventh. That on or about the 30th day of December, 1893, the defendant, The Mercantile Trust Company, filed in this court
16 its bill of complaint against the said defendant Atlantic and Pacific Railroad Company, and therein set forth, among other things, that the said complainant was the trustee under the second mortgage upon the Western division of said company hereinbefore mentioned; that in and by said mortgage the said defendant Atlantic and Pacific Railroad Company agreed, among other things, promptly to pay all taxes and assessments upon the premises conveyed thereby, but that the said company had wholly failed to keep and perform its said covenants, and that there were then due large amounts of unpaid taxes in the Territories of Arizona and New Mexico; that the said complainant had duly demanded that the said railroad

company should keep and perform its said covenants, but that the said railroad company had wholly failed and refused to comply with such demand; and the said complainant in said cause further showed that the defendant Atlantic and Pacific Railroad Company was wholly and totally insolvent and unable to meet its existing and presently accruing obligations, and that the interests of the holders of the second-mortgage bonds secured by said mortgage were seriously imperiled thereby, and unless accorded judicial protection would be wholly lost, to the great detriment and damage of said bondholders.

That upon the filing of said bill such proceedings were thereupon had, that on January 4, A. D. 1894, the Honorable Needham C. Collier, a judge of this court, made an order appointing Joseph W. Reinhart, John J. McCook and Joseph C. Wilson, receivers, as in said bill prayed, of all and singular the lands, tenements and hereditaments of the defendant Atlantic and Pacific Railroad Company covered by the said second mortgage, which order was duly filed in said cause on said 4th day of January, 1894. That, as your orator is informed and believes, the said Joseph W. Reinhart, John J. McCook and Joseph C. Wilson filed their bonds and qualified as such receivers and entered into possession of all the real estate and property of the Western division of said defendant railroad company and continued in such possession until the 23rd day of August,
17 1894, on which date the said Joseph W. Reinhart resigned as such receiver, and by an order made and entered in said cause on or about that day, Aldace F. Walker was appointed receiver in his place and duly filed his bond and qualified as such receiver and entered into possession of the said railroad and property as coreceiver with said John J. McCook and Joseph C. Wilson; and from and after said date said Aldace F. Walker, John J. McCook and Joseph C. Wilson, as such receivers, have had and now have the actual possession, custody and control of all the property known as the Western division of the said railroad company covered by the said second mortgage and being the same property covered by and included in the said Western Division first mortgage to your orator as aforesaid; and, by reason of the fact that this court has, by the appointment of such receivers, taken into its custody and possession all of said mortgaged property situated within the jurisdiction of this court, your orator believes that it cannot proceed to adequately enforce the security provided in and by the said mortgage in any other court, and your orator is without remedy save in this court. That by an amended and supplemental bill of complaint, heretofore filed in said cause, your orator has been made a party defendant thereto for the sole avowed purpose of ascertaining the amount due on said first-mortgage bonds. Your orator prays leave to refer to the said bill of complaint of The Mercantile Trust Company, and to the order appointing said receivers and to all other acts and proceedings
18 in said cause on file in this court, as part of this, your orator's bill of complaint, with the same effect as if fully incorporated in the body thereof.

Twelfth. And your orator further shows that the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company have wholly made default in the fulfillment of their agreement hereinbefore mentioned to contribute to the extent of twenty-five per cent. of their earnings from business interchanged with the Atlantic and Pacific Railroad Company toward the payment of the interest upon the said first-mortgage bonds, and that the receivers of property and franchises of said two companies, who were also appointed receivers of the railroads and property of the defendant Atlantic and Pacific Railroad Company, have likewise wholly failed to fulfill and carry out the said agreement.

That there are important and nice questions in dispute between said three railroad companies and their respective receivers, growing out of various contracts for the operation of said Atlantic and Pacific railroad and the payment of its bonded and guaranteed debt, and that, as your orator is advised and believes, it is not practicable for the receivers of said Atchison, Topeka and Santa Fe railroad and said St. Louis and San Francisco railway to adequately assert and protect the interests of said Atlantic and Pacific first-mortgage bondholders.

Thirteenth. And your orator further shows that the said defendant Atlantic and Pacific Railroad Company is hopelessly insolvent and unable to pay its indebtedness now outstanding to a large amount, including the overdue interest upon its first-mortgage bonds hereinbefore mentioned, and that the said defendant railroad company cannot secure the means of paying the said overdue
19 obligations; and that it is necessary for the protection of the holders of said bonds issued under said Western Division first mortgage, that the property of said railroad company should be sold without delay. That the property and premises covered by the said first mortgage so made to your orator as aforesaid, are and constitute very inadequate security for the payment of the amounts due on the said bonds, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trust, and all persons interested in the property of said defendant railroad company.

Fourteenth. That default has been made in the payment of interest upon all of said first-mortgage bonds and such default has continued during more than six consecutive months; that the holders of the entire amount of the bonds secured by the said first mortgage, have joined in a demand requiring your orator, as trustee under said mortgage or deed of trust, to file this bill and have concurred in the application for a decree for the foreclosure of said mortgage and the sale of the mortgaged premises, and for the appointment in the meantime of a receiver thereof; that the holders of all of said bonds have likewise united in a declaration electing that the principal of the said bonds shall be considered due, and that by reason of the facts hereinbefore alleged, the whole amount of the principal of said bonds, as well as all interest due thereon, as hereinbefore mentioned, is now due and payable, and that your orator

is entitled to apply to this court for the foreclosure and sale of the premises covered by the said first mortgage, and for the appointment in the meantime of a receiver of said mortgaged premises in the interest of said first-mortgage bondholders.

20 Fifteenth. That no proceedings have been had at law or in equity for the collection of said mortgage debt or any part thereof.

In consequence of the embarrassed condition of the financial affairs of the defendant railroad company and on account of the many difficulties which are manifestly, from the allegations hereinbefore contained, involved in the execution of your orator's said trust, it is impossible for your orator, as trustee under said first mortgage, to execute its said trust in the way and manner specified and provided in and by the said mortgage without the aid or interposition of this honorable court, in chancery sitting, nor can the said trust be executed, as your orator is advised and charges, and the rights of your orator be fully protected in the premises otherwise than by judicial sale of the mortgaged premises and of all the franchises, property, premises and appurtenances of said defendant railroad company; and your orator is likewise advised and charges that until such sale can be had and the proceeds thereof distributed, it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust, as aforesaid, and all the rights, franchises and property of said railroad company of whatever name, nature or description covered by said mortgage, including all its moneys on hand and the earnings of the same, be placed in and continue in the hands and under the control of a receiver appointed herein by this court, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred.

Sixteenth. That this suit is one arising under the Constitution and laws of the United States, and that the matter in controversy herein is upwards of five thousand dollars exclusive of costs.

21 In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated, your orator prays:

First. That a receiver may be appointed in this cause of all and singular the rights, franchises, and property of every name and nature of said defendant Atlantic and Pacific Railroad Company, with power and authority to operate said railroads and to preserve the property of said defendant, and to carry on the business of said railroad company, under the direction of this court, with all the usual powers and duties of receivers in such cases, and

with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to the said railroad company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever, and that an injunction may issue out of this court restraining and enjoining the said railroad company and all and every its agents and servants from, in any way, interfering with the possession or control of the property of said railroad company under the control of said receiver, and from selling, transferring, conveying, leasing or otherwise disposing of or encumbering any of the property, rights or franchises of the said railroad company.

22 Second. That the said Western Division first mortgage, dated July 1, A. D., 1880, may be decreed to be a first lien upon all the property, real, personal and mixed, rights and franchises described in the said mortgage, and then owned or subsequently acquired by said defendant Atlantic and Pacific Railroad Company to secure the payment of said bonds issued thereunder, and the interest and coupons for interest on the said bonds outstanding and unpaid, and the interest thereon, and that an account be taken of the bonds secured by said first mortgage and of the amount due and unpaid on the said bonds and the coupons thereon.

Third. That said defendant Atlantic and Pacific Railroad Company may be decreed to pay all moneys now due or to become due and payable under and by virtue of said first mortgage, and of the bonds issued thereunder and secured thereby, and of the coupons for interest thereon, and that in default thereof said Atlantic and Pacific Railroad Company and all persons claiming under, by or through it, or claiming any interest in said mortgaged premises and property or any part thereof, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises and every part and parcel thereof, and that all the property of said defendant railroad company, real, personal and mixed, and all the effects, rights, immunities and franchises belonging to it or covered by said mortgage may be sold under the direction of this honorable court in such manner as the court may direct and according to the law and practice of this court, to satisfy the amount found due, and that out of the proceeds of such sale, or the net earnings while in the hands of said receiver, there may be paid first; the costs and expenses of your orator in this suit, including proper attorneys', solicitors' and counsel fees, with

23 a proper compensation to your orator for its own service as trustee, to be allowed by the court, and that the residue thereof may be applied in such proportions and when and as the court shall order and direct, and in due order of priority, to the payment of the said bonds issued under said first mortgage and the coupons for interest thereon, together with interest on said bonds and coupons, and that any deficiency on such sale may be entered in this cause as a judgment against said defendant railroad company.

Fourth. That your orator may have such other and further relief

in the premises as the circumstances of the case may require and may be agreeable to equity.

May it please your honors to grant unto your orator a writ of subpœna issuing out of and under the seal of this honorable court, directed to the defendants Atlantic and Pacific Railroad Company, Atchison, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of the Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company and The Boston Safe Deposit and Trust Company, to appear and answer this bill.

And your orator will ever pray, &c.

UNITED STATES TRUST COMPANY
OF NEW YORK,
[SEAL.] By JOHN A. STEWART, *President.*

24 Attest:
H. L. THORNELL, *Secretary.*

EDWARD W. SHELDON,
Complainant's Solicitor.
FREDERICK B. JENNINGS,
Of Counsel.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, John A. Stewart, being duly sworn, depose and say that I am president of The United States Trust Company of New York, the complainant above named, and have been such president for a number of years past; that I have read the foregoing bill of complaint and know the contents thereof, and that the same is true to the best of my knowledge, information and belief; that this verification is not made by the complainant because it is a corporation; that my knowledge or information *are* derived from having taken part in some of the transactions spoken of, from statements, made to me, and from examination of the papers, and the same constitute my grounds of belief, and that the seal affixed to said bill of complaint is the corporate seal of said complainant and was so affixed by its authority.

JOHN A. STEWART.

Sworn to before me this 10th day of July, 1895.
HENRY C. KENNEDY,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed N. Y. Co.

25 EXHIBIT A.

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the United States Trust Company of New York, a corporation duly organized and existing under the laws of — State of New York, party of the second part, witnesseth:

That whereas the party of the first part, under the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip and put in operation as rapidly as practicable, that part of said company's authorized line of railroad and telegraph lying between the Rio Grande river and the Pacific ocean, and hereinafter described and referred to as the "Western division;"

And whereas, the party of the first part has duly executed an agreement under seal, dated January 31, 1880, wherein, among other things, it agreed with the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to complete said Western division as rapidly as practicable, and that the railroad of the St. Louis and San Francisco Railway Company and the railroad of the Atchison, Topeka and Santa Fe Railroad Company and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous through line of railroad to and from the Mississippi and Missouri rivers
26 and the Pacific coast for and during the term of thirty (30) years from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910; and in consideration thereof said Atchison, Topeka and Santa Fe Railroad Company and said St. Louis and San Francisco Railway Company have executed the contract of guaranty indorsed hereon;

And whereas, said act of Congress provides as follows:

"SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold,

granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof,
27 under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate and associate said company upon the terms named in the first and seventeenth with sections of this act: Provided, further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

"SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior,
28 and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situatedopposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

And whereas, by an act of Congress, entitled "An act to enable

the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20, 1871, it was enacted as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road, equipment, lands, franchises, privileges, and other rights and
29 property, subject to such terms, conditions and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior; provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And, whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the "Western division," has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even date herewith; and said coupon bonds are all of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $1,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Coupon Six per Cent. Gold Bond.

Know all men by these presents that the Atlantic and Pacific
30 Railroad Company is indebted & promises to pay to the United States Trust Company of New York, trustee or bearer, one thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, together with interest thereon at the rate of six per cent. per annum in like gold coin, payable semi-annually on the first days of January and July, according to the tenor of the coupons hereto annexed, and upon presentation thereof as they severally fall due; both principal and interest will be paid at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company

and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor; and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith, to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

First. To provide for any deficiency in the net earnings
31 for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Sante Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgaged bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the books of the Atlantic and Pacific Railroad Company at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

32 In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and
[SEAL.] these presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880,

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

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And said registered bonds are of the tenor and form following, namely:

No. —. UNITED STATES OF AMERICA. $5,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Registered Six per Cent. Gold Bond.

Know all men by these presents that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of July, A. D., 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, with interest thereon at the rate of six per cent. per annum in like gold coin, payable semi-annually on the first days of January and July; both principal and interest payable at the agency of the railroad company in the city of New York.

33 It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for payment thereof to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the railroad company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected and payment thereof equally secured by a first mortgage of even date herewith, to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants and other property pertaining to said Western division as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company

34 to the Atlantic and Pacific Railroad Company under their contract endorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage. And this bond is entitled to the benefit of such provisions.

This bond is not valid unless authenticated by a certificate endorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these [SEAL.] presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAILROAD COMPANY,

By —— ——, *President.*

Attest: —— ——, *Secretary.*

And whereas, the following certificate is to be endorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a first mortgage of even date herewith, executed by said railroad company to the
35 United States Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Western division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, endorsed upon said mortgage..

—— ——, *Trustee.*

And whereas, the party of the first part, being about to issue some of said bonds and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desires to secure the principal and interest of all the said bonds by a mortgage of the franchises and properties hereinafter described to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of said bonds, without any preference by reason of priority of issue, or any other cause or thing whatsoever, and the party of the second part has signified its willingness to accept said trust:

Now, therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does, by these presents, grant, bargain, sell, transfer, assign and convey to the party of the second part, trustee as hereinafter set forth, its successor or successors in said trust, and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts,

36 rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such a point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and in equity, of the party of the first part, of, in and to the same, and any and every part thereof, with appurtenances:

To have and to hold the same to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions, and agreements, and to and for the uses and purposes hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these
37 presents to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds from time to time issued and negotiated shall be deposited, one-half with the United States Trust Company of New York, and one-half with the Boston Safe Deposit and Trust Company of Boston, or, in whole or in part, with such other trust companies as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approved, to the credit of the party of the first part, and shall be used for the purpose of constructing, equipping, maintaining and operating said Western division of the Atlantic and Pacific Railroad Company and for the payment of the interest maturing on such bonds until the completion of said division to the Pacific coast, or until such party of the second party shall, by a contract with any other road, form a through line, properly equipped to the Pacific coast, and for one year thereafter. The party of the first part agrees to complete said Western division or form such through line, as aforesaid, with due and reasonable diligence; to furnish to the party of the second part during construc-

tion, monthly accounts, showing the application of said proceeds, and to permit, at any and all reasonable times, an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for, the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion from time to time sell the lands received from the United States
38 under said first-named act of Congress, and any and all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the land sold, and the party of the second part, its successor or successors in said trust, shall upon demand from time to time release the lands thus sold to the party of the first part, or to the purchaser thereof, as may be deemed most advisable; provided, however, that the appointment of the land commissioner shall be made by the party of the first part with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify, upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable, and such certificate shall, for the protection of the party of the second part, be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the United States Trust Company of New York, trustee, or its successor or successors in said trust, and used solely—

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

Second. To provide for any deficiency in the net earnings
39 for the payment of interest on the second mortgage bonds.

Third. For the payment of the principal and interest of any advances, made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

Provided, however, that the bonds hereby secured may be received at par and accrued interest in payment for any and all of said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other

lands, buildings or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph; provided, however, that in case of sale the net proceeds thereof be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain and enjoy the railroad and telegraph composing said Western division, and all the franchises, rights and property of every kind with the appurtenances included in this mortgage, and collect, receive and use the rents, tolls, issues, income and profits thereof.

Article 5. If there shall be any default in the payment of the interest of the bonds hereby secured or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the second part, its successor or successors in said trust, may personally or by its, his or their attorney or agent, enter upon, take, possess, maintain, and operate said railroad and telegraph and all franchises, property and appurtenances of every description belonging or pertaining to said Western division, and make any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income and profits thereof, and shall sell and dispose of said lands and land grants; and, after paying all taxes, assessments and liens superior to the lien created by these presents, and all proper expenses of construction, operating and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows, namely:

First. To the payment of interest on said first-mortgage bonds.

Second. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third in amount of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due the said remainder shall be applied to payment of interest and principal without preference.

Third. If said principal is not due or elected to be considered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3, and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest-bearing

indebtedness pertaining to said Western division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And, if the earnings of said railroad and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid, shall surrender and restore the railroad and telegraph with all the rights, franchises and property of every kind pertaining to said Western division, and all additions thereto and extensions thereof, and, reserving all funds which should be retained and applied under article 3, shall deliver up all moneys, bills, accounts, claims and demands of every name and nature pertaining to said Western division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage; provided, however, that any default may be waived by the written assent thereto of a majority in interest of the bonds outstanding; but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described
42 in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth in amount of said first-mortgage bonds outstanding, with indemnity for expenses liable to be incurred, shall, with or without entry, sell the said franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all property of every description then composing and pertaining to said Western division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago and San Francisco, not less than three times a week for six consecutive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale *and* good and sufficient deed or deeds in the law for the same in fee-simple; which sale and conveyance made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first part, and all persons claiming through, by or under the said party. The party of the second part, its successor or successors in said trust, may purchase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under any obligation to inquire into the necessity, expediency or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mort-

gage bonds hereby secured; and any surplus then remaining
43 shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the first-mortgage bonds secured hereby which may be issued, according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall, from time to time, and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph equipments and appurtenances hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Western division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with
44 the written assent of the holders of one-fourth in amount of all said bonds outstanding; and any vacancy in the trusteeship hereby created, occasioned by the dissolution, death, resignation, removal, incapacity or refusal to act of the present or any succeeding trustee, may be filled by appointment made by the party of the first part, it successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And, if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon the application of the party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests and and powers before vested in his or its predecessor under this mortgage, and upon the trusts, agreements and conditions, and to and

for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors and administrators respectively, that they will execute, acknowledge and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as
45 often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances and assurances in the law for the better assuring to such successor or successors the said estates, rights, titles, properties, interests and powers as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis and San Francisco, twice each week for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfacfory to said meeting that they are *bona fide* holders of said bonds, shall be entitled in person, or by attorney, to vote in proportion to the amounts held by them.

Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys or servants in the discharge of said trust, and the just and reasonable charges of said trustee and its agents, attorneys and servants shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered or neglected by its or their agents, attorneys, servants or employés selected in good
46 faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
[SEAL.] presents to be signed by its president, and attested by its secretary; and the United States Trust Company of New York, in token of its acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secretary, the day and year first above written.

ATLANTIC AND PACIFIC RAILROAD COMPANY,
By THOMAS NICKERSON, *President.*
Attest: S. W. REYNOLDS, *Secretary.*

UNITED STATES TRUST COMPANY OF NEW YORK,
[SEAL.] By JOHN A. STEWART, *President.*
Attest: J. S. CLARK, *Secretary.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

On this third day of August, A. D. 1880, before me, Levi C. Wade, a notary public in and for said county of Suffolk, per-
47 sonally appeared Thomas Nickerson and S. W. Reynolds, known to me to be, respectively, in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that, by order of the board of directors of said company, they signed, attested and sealed with said company's seal the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[NOTARIAL SEAL.] LEVI C. WADE.

STATE OF NEW YORK, *City and County of New York*, } ss:

On this ninth day of August, A. D. 1880, before me came John A. Stewart, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in said city: that he is the president of the United States Trust Company of New York; that he knows the corporate seal of said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by authority of the board of trustees of said corporation; and that he signed the same as president of said corporation by the like authority.

[NOTARIAL SEAL.] HENRY L. THORNELL,
Notary Public, New York Co.

EXHIBIT B.

Whereas, the St. Louis and San Francisco Railway Company, the Atlantic and Pacific Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company duly executed an agreement under seal, dated January 31, 1880, wherein among other things,
48 they agreed that the railroad of the St. Louis and San Francisco Railway Company, and the railroad of the Atchison, Topeka and Santa Fe Railroad Company, and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous, through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast, for and during the term of thirty (30) years, from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910:

Now, therefore, in consideration of said agreement, and of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, do severally

covenant and agree with the Atlantic and Pacific Railroad Company and the United States Trust Company of New York, trustee in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that, if at any time after twelve months following the completion of the Western division of the said company in the within mortgage mentioned, or after twelve months after the Atlantic and Pacific Railroad Company shall, by a contract with any other road, have formed a through line to the Pacific coast, its earnings should prove insufficient to pay all coupons on said bonds as they mature, they will contribute, ratably, to the earnings, hereinafter described, for the purpose of paying and cancelling the same from their respective earnings upon all business received from and delivered to said Western division, by and from their lines of road as above set forth, such sum as may be necessary to make
49 up the deficiency of the earnings of the said Atlantic and Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty-five per cent. (25 per cent.) of the gross amount of their said described earnings respectively during the six months, ending on the first days of October and April, preceding the due date of such coupons.

In witness whereof, the said St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company have severally caused their corporate seals to be at-
[SEAL.] tached hereto, and these presents to be signed by their respective presidents and attested by the secretary of the first-named and the assistant secretary of the last-named company on this first day of July, A. D. 1880.

ST. LOUIS AND SAN FRANCISCO RAILWAY COMPANY,

[SEAL.] By E. F. WINSLOW, *President.*

Attest:

C. LITTLEFIELD, *Secretary.*

ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY,

[SEAL.] By T. JEFFERSON COOLIDGE, *President.*

Attest:

GEO. L. GOODWIN,
Assistant Secretary.

50 And thereafter and on, to wit: the 10th day of January, 1896, there was an order duly made and entered of record in the said cause appointing a receiver of the property and franchises of the Atlantic and Pacific Railroad Company, which said order is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO:

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY, of New York, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants. } No. 1122.

Order Appointing Receiver.

Now on this 10th day of January, A. D. 1896, comes the complainant, The United States Trust Company of New York, by Neill B. Field, one of its solicitors; and also come the defendants, except the defendant, The Boston Safe Deposit and Trust Company, by their respective solicitors, and thereupon, upon the record in this cause, comes on for hearing the application of The United States Trust Company of New York for the appointment of a receiver herein, which application is consented to by the defendants, The Atlantic and Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railroad Company, The St. Louis and San Francisco Rail-
51 way Company, and the receivers of the property and franchises of said three last-named corporations, The Mercantile Trust Company, defendant herein, not consenting, and the same having been heard by the court, and the court being now fully advised in the premises—

It is now hereby ordered, adjudged and decreed, that Charles W. Smith be and he hereby is appointed receiver of all and singular the lands, tenements and hereditaments of the said Atlantic and Pacific Railroad Company covered by the mortgage sought to be foreclosed herein, and also all personal estate thereof, including all its railroad tracks, rights of way, sidings, structures, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with its leases, rights under lease, rents from hired lands or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks, and other rolling stock, its machinery, tools, scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description; and all its stocks, bonds and obligations, choses in action, accounts and rights under contracts now owned or possessed by the said defendant railroad company, covered by the mortgage sought to be foreclosed herein, together with the corporate rights, immunities and franchises, and all of the tools, fares, freights, rents, income and profits covered by said mortgage; and that the said receiver be and he is hereby authorized and directed to take possession of all and singular the railroads and properties above described, or above referred to, wherever situated or found, and to continue the opera-

tion of the said railroad, and every part or portion thereof,
52 and to run, manage and operate the said railroad, and every part or portion thereof, and such other railroads as the said defendant railroad company owns or holds, controls or operates under lease, contract, arrangement or otherwise, as heretofore run and operated, or which have been, or are being operated by, for or in the interest of the said Atlantic and Pacific Railroad Company, and to conduct the business and occupation of a common carrier of passengers and freight; and to discharge all public and governmental duties obligatory upon said corporation or upon any other corporation whose lines of road are now in the possession of or operated by the said Atlantic and Pacific Railroad Company, and to preserve the said property in proper condition, and repair the same so that it may be safely and advantageously used, and to protect the same, and to employ such persons and make such payments and disbursements as may be needful and proper in so doing.

It is further ordered, That the said receiver, within the next thirty days, file with the clerk of the court a proper bond with sureties, to be approved by the judge of this court, in the penal sum of fifty thousand dollars, conditioned for the faithful discharge of his duties, and to account for all funds given into his hands according to the orders of this court.

Each and every of the officers, attorneys, agents or employés of the said Atlantic and Pacific Railroad Company, and all other persons or corporations are hereby required to turn over and deliver to such receiver, or his duly constituted representatives, any and all railroad property, books of account, vouchers, deeds, leases, contracts, bills, notes, accounts, moneys, stocks, bonds or obligations, or other property in his or their hands and in his or their control; and each and every of such attorneys, officers, agents, employés, persons or corporations are hereby required and commanded to obey and conform to such orders as may be given them from time to time by such receiver, or his duly constituted representatives, in conducting the operations of such property, and in discharge of his
53 duties as such receiver.

And it is further ordered, adjudged and decreed, that the said defendant, its agents, officers and servants, and all other persons be, and the same are hereby restrained and enjoined during the pendency of this action from interfering with, transferring, selling, or disposing of any of the property of the said defendant railroad company, or from taking possession of or in any manner whatever interfering with the same or any part thereof, or from interfering in any manner whatever with the possession or management of any of said property over which the receiver is hereby appointed or from interfering in any manner to prevent the discharge of his duties or from the operation of the said property under the order of this court.

And the said receiver is hereby fully authorized to operate the said Atlantic and Pacific railroad and to manage the property of the said corporation in such manner as will in his judgment produce the most satisfactory results, consistent with the discharge of

the public duties imposed thereon; and to collect and receive all of the income therefrom, and all of the debts due the said company of all kinds, and for such purpose is hereby vested with the full power in his discretion to employ and discharge, and to fix the compensation of such officers, agents, attorneys, managers, superintendents and employés as are necessary to aid in the dis-
54 charge of his duties, except that the said receiver shall continue in service all the officers and employés of the receivers heretofore appointed by this court in the case of The Mercantile Trust Company *vs.* The Atlantic and Pacific Railroad Company *et al.*, numbered 999 on the calendar of this court, in the respective positions they occupy, for at least one month after qualification and entrance upon duty by said receiver, provided that for special cause, approved by the court, any or either of said officers or employés may be sooner removed or discharged; and provided further, that this exception shall not prevent discharge or dismissal from service, of any officer or employé for neglect of duty or disobedience of orders or regulations given or prescribed; and he shall have power, with the sanction of the court, to redeem any and all of the securities of the company now pledged as securities on loans of money.

The said receiver is fully authorized and empowered to institute and prosecute such suits that may be necessary in his judgment for the proper protection of the property and trusts hereby vested in him, and to likewise defend all such actions instituted against him as such receiver, and also to come in and aid in the prosecution and defense of any of the suits now pending against the Atlantic and Pacific Railroad Company, the prosecution or defense of which will in his judgment be necessary for the proper protection of the property placed in his charge.

It is further ordered, adjudged and decreed, that out of the moneys that shall come into his hands, as such receiver, from the operation of the said railroad properties, or otherwise, he shall:

First. Pay all current expenses incident to the creation and administration of this trust and to the operation of the said railways or railroads and properties.

Second. Pay all sums due or to become due connecting or intersecting lines of railways, arising from the interchange of business and for track service of other railroads used by said defendant in the operation of its lines and traffic, and car-mileage balances and all amounts now due from the defendant on its road or properties, constituting part of the said system, for taxes and assessments
55 upon the property, or any part thereof.

Third. To pay all sums which are now due and have accrued since the first day of July, 1893, for material or supplies used in the operation or maintenance of said defendant railroad company; and also all sums or amounts due for wages to officers, agents or employés of the defendant railroad company accruing since the first day of July, 1893.

Fourth. To pay all liabilities or damages which may have been or shall be incurred by any person or corporation who may have become sureties of the said defendant company on stay, supersedeas

or cost bonds, or upon any garnishment proceedings, or bonds of other like character without regard to the date of said bonds.

It is further ordered, adjudged and decreed, that the appointment of the said Charles W. Smith as such receiver, and the powers by this order conferred upon him, shall be and become operative, in force and vested from the first day of February, A. D. 1896; that the transfer of the property from the receiver in the Mercantile Trust Company case to the receiver hereby appointed, is made upon the express condition to which the United States Trust Company of New York expressly assents, that this court may in this case, before all priorities and allowances which it could have enforced in the said Mercantile Trust Company case if there had been no change in the receivership.

N. C. COLLIER,
Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Second Judicial District Court Thereof.

And thereafter and on, to wit: the 12th day of March, 1896, there was filed in the office of the clerk of the said court the intervening petition of the Territory of New Mexico for an order on the
56 receiver in the said cause to pay taxes, which said intervening petition is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant, *vs.* ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants. } No. 1122.

Petition of the Territory of New Mexico for an order requiring the receiver of the Atlantic and Pacific Railroad Company to pay the taxes levied upon the property of said company in said county for the year 1895.

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

Your petitioner, The Territory of New Mexico, respectfully represents unto your honor:

That in a certain action commenced in said court on the 4th day of January, 1894, and still pending therein, wherein The Mercantile Trust Company of New York is complainant and The Atlantic and Pacific Railroad Company and The United States Trust Company of New York are the defendants, J. W. Reinhart, John J. McCook, and Joseph C. Wilson were duly and legally appointed receivers of

the property of said Atlantic and Pacific Railroad Company,
57 and were at the time provided by law when returns of property for the purposes of taxation were required to be made to the assessor of said county in the year 1894, the duly appointed, qualified, and acting receivers of the property of said company.

That, afterward, the said J. W. Reinhart having resigned as such receiver, Aldace F. Walker was appointed receiver in his place, and at the time provided by law for the making of said returns in the year 1895, the said Aldace F. Walker, John J. McCook and Joseph C. Wilson were the duly appointed, qualified and acting receivers of the property of said Atlantic and Pacific Railroad Company.

That the said Atlantic and Pacific Railroad Company at the time required by law in the year 1893, and the said receivers of the property of said railroad company in the years 1894 and 1895, duly made returns to the assessor of said county of Bernalillo, of all property which said company and said receivers admitted to be subject to taxation in said county for said years, respectfully, copies of which said returns are hereunto attached and made a part of this petition, marked Exhibits "A," "B," and "C."

That at the proper time, the assessor of said county of Bernalillo made an assessment upon the property of said railroad company in said county and entered the same upon the assessment-roll of said county for the year 1895; and as your petitioner is informed and believes, and so charges the fact to be, in compliance with instructions received from the board of county commissioners of said county, included in said assessment and entered upon said assessment-roll, in addition to the property so as aforesaid returned by said receivers for said year, an assessment of which the following is a true copy:

58 *Additional Assessment.*

The improvements, cross-ties, fish-bar plates, bolts, bridges, culverts and structures, together with the telegraph line erected upon and constructed over the right of way of the said railroad company, commencing at a point where the said road connects with the railroad of the Atchison, Topeka and Santa Fe Company, at the A. & P. Junction, thence in a westerly direction four miles and three thousand seven hundred and eighty feet to a point where the said railroad crosses the line of Valencia county, at $6,500 per mile.....	$30,550
Also the improvements, cross-ties, fish-bar plates, bolts, bridges, culverts and structures, together with the telegraph line erected upon and constructed over the right of way of the said railroad company, commencing at a point where the said road crosses the line of Valencia county and re-enters the county of Bernalillo, at station 5,247, sixty-eight miles and fifty-four feet to the west line of the said county of Bernalillo, also the west line of the Territory of New Mexico, at $6,500 per mile...	445.315

Station-houses, shops, depots, switches, water tanks and improvements at Albuquerque	30,000
Same, A. & P. Junction	1,690
Same, Chaves or Mitchell	1,233
Same, Coolidge	10,308
Same, Wingate	3,196
Same, Gallup	15,565
Same, Manuelito	2,103

And said assessor carried out the value of said improvements upon said assessment-roll for said year, at the sum of $539,950, to
59 which he added twenty-five per cent. as a penalty for failure to make a return of said property, making the total assessed value of the property of said company in said county for said year, including that returned as aforesaid by the receivers thereof, and not including its land grant, the sum of $1,205,897.00.

And that said assessor did also, as your petitioner is informed and believes and so charges the fact to be, in pursuance of instructions received from said board of county commissioners, as aforesaid, place upon the assessment-roll of said county for the year 1895, the above-described property for the years 1893 and 1894, marking the same "Additional assessment for the year 1893. The following was omitted from the return made by the A. & P. R. R. for the year 1893," and "Additional assessment for the year 1894. The following was omitted from the return made by the A. & P. R. R. for the year of 1894," respectively, and carried out the value of said property for each of said years upon said assessment-roll, at $539,950.00, to which he added as a penalty for failure to make return of said property for each of said years, twenty-five per cent. making the total assessed value of said property for each of said years, the sum of $674,937.00.

That the taxing authorities of said county thereafter levied the taxes upon said assessments as contained in said assessment-roll, and said taxes were duly entered upon said assessment-roll, and tax-list opposite the said assessments as follows:

Opposite the assessment for the year				1895	$30,311 74
"	"	"	"	1893	15,688 36
"	"	"	"	1894	15,688 36

Making the total tax on said tax-roll against said company,
60 $61,688.46. And that one-half of said taxes, to wit, the sum of $30,844.23 became delinquent by virtue of the statute in such case made and provided, on the first day of January, 1895, and that no part of said taxes has been paid to your petitioner.

Your petitioner further shows unto your honor that at the time required by law, the said tax-roll for the county of Bernalillo aforesaid, duly certified as required by law, was placed in the hands of Alejandro Sandoval, the duly qualified and elected collector of taxes and licenses in and for said county of Bernalillo in the Territory of New Mexico, and the said Alejandro Sandoval as such collector, thereby became charged with the duty of collecting from the

said railroad company or its receivers, the taxes so levied and assessed against it, and your petitioner charges the fact to be, that the levy and assessment of the said taxes created a lien upon all the property of the said defendant, Atlantic and Pacific Railroad Company, within the county of Bernalillo aforesaid, prior and superior to all other liens and encumbrances; which lien it would be the duty of said Alejandro Sandoval as such collector, to enforce by the seizure of the property of said defendant, Atlantic and Pacific Railroad Company, and sale thereof, or a sufficient amount thereof to satisfy the said taxes, together with interest and penalties which have accrued thereon, were it not for the reason hereinafter stated.

Your petitioner further shows unto your honor that at the time the first half of the said taxes became delinquent, to wit, on January first, 1896, the property of said defendant Atlantic and Pacific Railroad Company was in the hands and under the control of Aldace F. Walker and John J. McCook, the receivers theretofore duly appointed by this honorable court in the action of The Mercan-
61 tile Trust Company of New York, complainant, against Atlantic and Pacific Railroad Company and The United States Trust Company of New York, defendants, as aforesaid, and that by an order of said court made in said cause on the tenth day of January, 1896, Charles W. Smith was appointed receiver of said property in place of the said Walker and McCook, and by virtue of said order took possession of said property on the first day of February, 1896, and since said date has been the duly appointed, qualified and acting receiver of said property; and by an order made in this cause on said tenth day of January, 1896, the said Charles W. Smith was likewise appointed a receiver of said property, and took charge and control thereof on said first day of February, 1896, by virtue of said order, and ever since said date has controlled and operated and now controls and operates the same, as such receiver under the orders of this honorable court.

Your petitioner further shows unto your honor that by reason of the appointment of said receivers in the said suit of the Mercantile Trust Company of New York against Atlantic and Pacific Railroad Company and the United States Trust Company of New York, and the subsequent appointment of said Charles W. Smith as receiver in that action and in this proceeding, as aforesaid, said Alejandro Sandoval as such collector was and is prevented from proceeding in the manner prescribed by law to enforce the collection of the said taxes so levied against the said defendant, Atlantic and Pacific Railroad Company as aforesaid; but your petitioner is likewise advised that it is the duty of said receiver to pay the said taxes out of any moneys in his hands belonging to the said defendant; but, nevertheless, the said receiver denies his liability to pay the said
62 taxes so levied and assessed as aforesaid, and has refused and still refuses to pay the same, although thereunto requested by your petitioner.

Your petitioner further shows unto your honor that it is impracticable to file with this petition a copy of the tax-roll of the county of Bernalillo for said year 1895, but your petitioner files herewith

extracts therefrom showing the levy and assessment of said taxes against said Atlantic and Pacific Railroad Company marked Exhibits "D," "E," and "F," and now here offers to produce when and where this honorable court shall direct, the original tax-roll of said county for said year, for the inspection of the said receiver, if thereunto required.

Your petitioner shows unto your honor that it is the manifest duty of the said receiver to pay the said taxes so levied and assessed, as they appear upon the said tax-roll; but, inasmuch as the said receiver refuses to pay the same, your petitioner is without remedy except in this proceeding.

Wherefore your petitioner prays that the said receiver may be ordered to pay all unpaid taxes levied and assessed against the Atlantic and Pacific Railroad Company as they appear upon said tax-roll of said county of Bernalillo for the year 1895, and that your petitioner may have such other and further relief in the premises as equity may require and to your honor may seem meet.

THOS. N. WILKERSON,
District Attorney for the Second Judicial District, Territory of New Mexico, Composed of the Counties of Bernalillo and Valencia, Solicitor for Petitioner.

TERRITORY OF NEW MEXICO, *County of Bernalillo,* } ss:

Jose Perea, being first duly sworn, upon his oath deposes
63 and says: That he is the duly qualified deputy collector for the county of Bernalillo, New Mexico; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to so much and such parts thereof as are made upon information and belief, and as to those allegations he believes them to be true.

J. L. PEREA.

Subscribed and sworn to before me, this 12th day of March, 1896.
[SEAL.] THOS. N. WILKERSON,
Notary Public.

EXHIBIT A.

List of Personal Property

Belonging to, claimed by or in the possession or under the control of the Atlantic and Pacific Railroad Company (Western division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico, the line of its road passing through the counties of Bernalillo and Valencia, in said Territory of New Mexico, and thence through the counties of Apache, Coconino, Yavapai, and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line and its terminus at Mohave in said county of Kern, a total distance of 802.8 miles; the total mileage of said line owned by said company in said Territory of New Mexico being 166.6 miles,

of which 73.142 miles are in Bernalillo county and 93.458 miles are in Valencia county.

And the said company makes a full report of all its personal property, to wit:

64 *Personal Property Owned by the Atlantic and Pacific Railroad Company.*

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars and other equipment owned, possessed or used by said Atlantic and Pacific Railroad Company upon its entire line aforesaid. $452,960

Said company returns its personal property in the county of Bernalillo, because it is advised that the situs and domicile of its rolling stock are in said county and the same is returnable there, although the authorities in Arizona and California are attempting to enforce the collection of taxes upon the rolling stock included in this return, in their respective jurisdictions, notwithstanding the fact that the same is duly returned for taxation in New Mexico.

Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationary, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup, and Manuelito.... 78,000

Total... .... $530,960

Said return is of personal property which the Atlantic and Pacific Railroad Company has listed for taxation in the county of Bernalillo and Territory of New Mexico, notwithstanding the fact that the counties through which its road passes in the Territory of Arizona and State of California claim and insist upon the right to tax said property in proportion to the mileage said road may have in said counties.

65 Said company in making this return denies that any of its rolling stock is subject to taxation within the corporate limits of the city of Albuquerque and the town of Gallup, for city and town purposes; but herewith lists, on separate sheets, the proportionate value of all of its above-mentioned personal property within the corporate limits of said city and town, respectively, subject to taxation for territorial or county purposes.

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at $530,960) situate or having its situs within the corporate limits of the city of Albuquerque.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, and other equipment owned, used or controlled by said company, and located within or running into the corporate limits of the city of Albuquerque..... $170,000

Track tools and other personal property, including office and station furniture, law library, books, stationery, supplies and materials, etc., located within the corporate limits of said city of Albuquerque	30,000
Total.	$200,000

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at $530,960) situate or having its situs within the corporate limits of the town of Gallup, New Mexico.

Switch engines, track tools, and other personal property, including office and station furniture, situate within the corporate limits of the town of Gallup.....	$5,000

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

66 I, C. N. Sterry, do solemnly swear that I am the general attorney of the Atlantic and Pacific Railroad Company, and that, according to the best of my knowledge and belief, the above list contains a full and correct statement of the personal property of the said Atlantic and Pacific Railroad Company subject to taxation within the county of Bernalillo, in the Territory of New Mexico, which said company owns, possesses or controls, and which is not already assessed for the year 1893, together with the proportion of said personal property situate within the limits of the city of Albuquerque, and the proportion thereof situate within the limits of the town of Gallup.

C. N. STERRY.

Subscribed and sworn to before me this 15th day of April, A. D. 1893.

[SEAL.] KARL A. SNYDER,
Notary Public.

EXHIBIT B.

List of Personal Property.

Belonging to, claimed by, or in the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico; the line of its road passing through the counties of Bernalillo and Valencia, in said Territory of New Mexico, and thence through the counties of Apache, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line and its terminus at
67 Mojave, in said county of Kern, a total distance of 802.8 miles; the total mileage of said line owned by said company

in said Territory of New Mexico being 166.6 miles, of which 73.142 miles are in Bernalillo county, and 93.458 miles are in Valencia county.

And the receivers of said company make a full report of all of its personal property as follow, to wit:

Personal Property Owned by the Atlantic and Pacific Railroad Company.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars and all other equipment owned, possessed or used by said Atlantic and Pacific Railroad Company upon its entire line aforesaid	$452,960
Said company returns said personal property in the county of Bernalillo, because it is advised that the situs and domicile of its rolling stock are in said county and the same is returnable there, although the authorities in Arizona and California are attempting to enforce the collection of taxes upon the rolling stock included in this return, in their respective jurisdictions, notwithstanding the fact that the same is duly returned for taxation in New Mexico.	
Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito	78,000
Total	$530,960

68 Said return is of personal property which the receivers of the Atlantic and Pacific Railroad Company have listed for taxation in the county of Bernalillo, Territory of New Mexico, notwithstanding the fact that the counties through which its road passes in the Territory of Arizona and State of California claim and insist upon the right to tax said property in proportion to the mileage said road may have in said counties.

The receivers of said company in making this return deny that any of its rolling stock is subject to taxation within the corporate limits of the city of Albuquerque and the town of Gallup, for city and town purposes; but herewith list on separate sheets, the proportionate value of all of its above-mentioned personal property within the corporate limits of said city and town, respectively, subject to taxation for territorial or county purposes.

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at $530,960.00), situate or having its situs within the corporate limits of the city of Albuquerque, New Mexico.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, and other equipment owned, used or controlled by said company, and located within or running into the corporate limits of the city of Albuquerque..... $170,000

Track tools and other personal property, including office and station furniture, law library, books, stationery, supplies and materials, etc., located within the corporate limits of the city of Albuquerque $30,000

Total..... ..... $200,000

69 Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at $530,960), situate or having its situs within the corporate limits of the town of Gallup, New Mexico.

Switch engines, track tools and all other personal property, including office and station furniture, situate within the corporate limits of the town of Gallup.. .. .. $5,000

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

I, C. N. Sterry, do solemnly swear that I am the general attorney for the receivers of the Atlantic and Pacific Railroad Company, and that, according to the best of my knowledge and belief, the above list contains a full and correct statement of the personal property of the said Atlantic and Pacific Railroad Company subject to taxation within the county of Bernalillo, in the Territory of New Mexico, which said receivers own, possess or control, and which is not already assessed for the year 1894, together with the proportion of said personal property situate within the limits of the city of Albuquerque, and the proportion thereof situate within the limits of the town of Gallup.

C. N. STERRY.

Subscribed and sworn to before me this 31st day of March, A. D. 1894.

[SEAL.] KARL A. SNYDER,
Notary Public.

EXHIBIT C.

Bernalillo county, New Mexico, 1895.

List of Personal Property

Belonging to, claimed by, or in the possession or under the
70 control of the receivers of the property of the Atlantic and Pacific Railroad Company (Western division), a corporation

created by act of Congress, having its principal place of business at Albuquerque, New Mexico; the line of its road running through the counties of Bernalillo and Valencia, in said Territory of New Mexico; thence through the counties of Apache, Navajo, Coconino, Yavapai, and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line and its terminus at Mojave in said county of Kern, a total distance of 805.86 miles; the total mileage of said line owned by said company in said Territory of New Mexico being 166.6 miles, of which 73.142 miles are in Bernalillo county and 93.458 miles are in Valencia county.

And the receivers of the property of said company make a full report of all its personal property as follows, to wit:

Personal Property Owned by the Atlantic and Pacific Railroad Company.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars, and all other equipment owned, possessed or used by said receivers or said company upon the entire line aforesaid.....	$452,960
Said receivers return said property in the county of Bernalillo because they are advised that the situs and domicile of the rolling stock of said company are in said county and the same is returnable there, although the authorities in Arizona and California are attempting to enforce the collection of taxes upon the rolling stock included in this return in their respective jurisdictions, notwithstanding the fact that the same is duly returned for taxation in New Mexico.	
Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito....	78,000
Total...	$530,960

71

Said return is of personal property which the receivers of the property of the Atlantic and Pacific Railroad Company have listed for taxation in the county of Bernalillo and Territory of New Mexico, notwithstanding the fact that the counties through which the road runs in the Territory of Arizona and State of California claim and insist upon the right to tax said property in proportion to the mileage said road may have in said counties.

The receivers of the property of said company in making this return deny that any of its rolling stock is subject to taxation within the corporate limits of the city of Albuquerque and the town of Gallup, for city and town purposes; but herewith list on separate sheets, the proportionate value of all of its above-men-

tioned personal property within the corporate limits of said city and town respectively, subject to taxation for territorial and county purposes.

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at $530,960) situate or
72 having its situs within the corporate limits of the city of Albuquerque, N. M.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat, and coal cars, and other equipment owned, used or controlled by said company or the receivers thereof, and located within or running into the corporate limits of the city of Albuquerque.....	$170,000
Track tools and other personal property, including office and station furniture, law library, books, stationery, supplies and materials, etc., located within the corporate limits of the city of Albuquerque.....	30,000
Total	$200,000

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at $530,960) situate or having its situs within the corporate limits of the town of Gallup, N. M.

Switch engines, track tools, and all other personal property, including office and station furniture, situate within the corporate limits of the town of Gallup	$5,000

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

I, C. N. Sterry, do solemnly swear that I am the general attorney for the receivers of the property of the Atlantic and Pacific Railroad Company, and that, according to the best of my knowledge and belief the above list contains a full and correct statement of the personal property of the said Atlantic and Pacific Railroad Company, subject to taxation within the county of Bernalillo, in the Territory of New Mexico, for the year 1895, which said company or said re-
73 & 74 ceivers own, possess or control, and which is not already assessed for the year 1895, together with the proportion of said personal property situate within the limits of the city of Albuquerque, and the proportion thereof situate within the limits of the town of Gallup.

C. N. STERRY.

Subscribed and sworn to beford me this 23d day of March, A. D. 1895.

[SEAL.] KARL A. SNYDER,
Notary Public.

(Here follow Exhibits "D," "E," and "F," marked pp. 75, 76, and 77.)

78 *Regular Session.*

ALBUQUERQUE, N. M., *Oct. 7th*, 1895.

Now comes Frank A. Hubbell, assessor of Bernalillo county, and presents to the board the assessment-rolls for the year 1895 as completed by him, and showing the total assessed value of $8,885,049. Amounting to the following amounts as divided to the several funds, according to the levy made and ordered, viz:

Territorial purposes	$53,314 73
Territorial institutions	15,550 13
Territorial cattle indemnity	15 93
County court fund	26,655 88
County general purposes	75,524 91
County school general	22,215 94
City of Albuquerque	26,063 13
City of Albuquerque schools	13,033 31
Town of Gallup	880 76
Town of Gallup schools	3,658 97
School district No. 12	405 77
School districts No. 13 and 35	567 90
Total	$237,888 36

The board after having carefully examined said tax-rolls are of the opinion that the same are correct and in good order, and therefore approve the same.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

OFFICE OF THE BOARD OF COUNTY COMMISSIONERS,
ALBUQUERQUE, N. M.

At a regular session held on the 7th day of October, A. D. 1895,
It is ordered by the board of county commissioners of said county
that the preceding assessment-roll, and each and every assess-
79 ment therein contained, as originally returned and assessed,
or as shown therein to have been revised and corrected, by the board, be, and the same is hereby approved; and that a tax of $\frac{85}{100}$ of 1% for county purposes, and of two and one-half mills on the dollar for school purposes, and of 3 mills on the dollar for court fund, and for various territorial funds, to wit:

For territorial purposes, 6 mills on the dollar.

For territorial institutions fund, 1 $\frac{75}{100}$ mills on the dollar.

For cattle indemity fund $\frac{50}{100}$ mills on the dollar of the appraised

value of cattle is hereby levied upon all the property therein returned assessed liable to taxation.

J. M. SANDOVAL,
Chairman of the Board.
JESUS ROMERO,
W. W. STRONG,
Commissioners.

Attest:
J. S. GARCIA,
[SEAL.] *Probate Clerk, &c.*

And thereupon, on the same day, to wit: the 12th day of March, 1896, there was duly made and entered of record in the said cause, an order, which said order is in the words and figurs following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, and others. } No. 1122.

80 Upon the reading and filing of the petition of the Territory of New Mexico praying that the said receiver of the Atlantic and Pacific Railroad Company may be ordered to pay all unpaid taxes levied and assessed against the Atlantic and Pacific Railroad Company as they appear upon the tax-roll of said county of Bernalillo for the year 1895, and that said petitioner may have such other and further relief in the premises as equity may require; and after hearing Thomas N. Wilkerson, district attorney for the counties of Bernalillo and Valencia, and being now fully advised of and concerning said petition,

It is ordered, adjudged and decreed, by the court, that said petitioner, the said Territory of New Mexico, be and is hereby granted leave to intervene herein; and that the parties complainant, and respondent to this cause be, and they are hereby ruled to show cause before the Honorable Needham C. Collier, at chambers at the courthouse in the county of Bernalillo on the 30th day of March, A. D. 1896, at 10 o'clock in the forenoon of said day why the prayer of said intarvening petitioner should not be granted; and it is further

Ordered, adjudged and decreed, by the court that the attorney for the said intervening petitioner serve copies of said petition upon Neill B. Field, Esq., solicitor for complainant, W. B. Childers, Esq., solicitor for the Mercantile Trust Company, H. L. Waldo, Esq., solicitor for the three railroad companies defendants herein, and

C. N. Sterry, Esq., solicitor for the receiver herein, on or before the 20th day of March, 1896.

N. C. COLLIER, *Judge.*

81 We hereby acknowledge service of the above petition on the 20th day of March, 1896, and waive service of the exhibits.

C. N. STERRY,
Solicitor for Receiver.

And thereafter and on, to wit: the 28th day of April, 1896, there was filed in the office of the clerk of the said court the answers of the United States Trust Company of New York, and of C. W. Smith, receiver in the said cause, to the intervening petition of the Territory of New Mexico, which said answers are as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant, *vs.* THE ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants. } No. 1122.

Answer of the United States Trust Company to the intervening petition of the Territory of New Mexico seeking to procure an order upon the receiver to pay certain taxes levied upon the property of the Atlantic and Pacific Railroad Company in Bernalillo county, Territory of New Mexico, for the year 1895.

82 The United States Trust Company by protestation not confessing or acknowledging all or any part of the matters or things in the intervening petition of the Territory of New Mexico filed herein, to be true, in such manner and form as the same are therein set forth and alleged, does answer and plead thereto in relation to the amount of taxes alleged to have been levied or assessed for the year 1896 against the property of the Atlantic and Pacific Railroad Company, amounting in the aggregate to the sum of $61,688.46, the following facts:

That the Atlantic & Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27th, 1866, and that under and by virtue of said act and prior to the year 1894, the Atlantic & Pacific Railroad Company constructed and built, and has ever since maintained in the county of Bernalillo and in said Territory of New Mexico, about seventy-four miles of railroad, the exact length of which the defendant herein is unable to state; that said line of railroad so built and constructed was and is built and constructed upon the right of way granted to the Atlantic and Pacific Railroad Company under and by virtue of said act of Congress aforesaid, which said right of way was and is

200 feet in width, including all the necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; that in addition to the milage hereinabove stated, the said railroad company has constructed nearly twenty-eight miles of side track in addition to the main track; that the said railroad company has also station-houses, shops, depots, water tanks, and imdrovements of like character at the stations known and called as follows:

A. & P. Junction, Mitchell, Coolidge, Wingate, Gallup, Manuelito, and Albuquerque.

83 That upon the right of way and station grounds of the Atlantic & Pacific Railroad Company in the county of Bernalillo, Territory of New Mexico, the said railroad company had prior to the first day of January, 1890, constructed and permanently attached to its right of way and station grounds its line of railroad consisting of ties and rails, bolts, bars, dirt, stone and culverts, sufficient to make a railroad track to operate trains upon; all of which became and was a part of said right of way; it also had permanently attached to its right of way and station grounds its station buildings, depots, machine shops, water tanks and other of like character of buildings and improvements at the stations above named. It also built and permanently attached to said right of way switches, side tracks and turn-tables, so that prior to the first day of January, 1890, and ever since said time the railroad track of said company and said buildings and improvements above mentioned were and ever since said time have been permanently attached to and become a part of said right of way.

The United States Trust Company admits that receivers were, are and have been appointed by this court of the property of the Atlantic & Pacific Railroad Company as alleged in said intervening petition.

And the United States Trust Company further admits that the Atlantic & Pacific Railroad Company for the year 1893, and the receivers of its property for the years 1894 and 1895 duly made returns to the assessor of said county and Territory of the property admitted by said railroad company and by said receivers to be subject to taxation in said county and Territory, and that copies of said returns are shown by Exhibits "A," "B," and "C" to the intervening petition.

The United States Trust Company further admits that the
84 assessor of the county of Bernalillo, during the year 1895, under instructions from the board of county commissioners, entered upon the assessment-roll of said county for said year an assessment, a true copy of which is set out and set forth in the intervening petition; and this defendant alleges and shows that the action of said assessor in so making said assessment was wrong and illegal, and that each and every item of property mentioned and described in said assessment was and is a part of the right of way and station grounds of the said railroad company, and was and is exempt from taxation in this Territory by and through the provisions contained in the second section of the charter of said railroad com-

pany. That each and every of the things mentioned and described in said assessment constitutes and is a part of the line of railroad of the said railroad company, permanently attached to and permanently a part of said right of way, save and except the specific items mentioned as station-houses, depots, shops, switches, water tanks, and improvements at the different stations. That no one thing or item of property mentioned and described in said assessment was or is subject or liable to taxation in the Territory of New Mexico, and that each and every item thereof was and is permanently attached, affixed to, and was and is a part of said right of way, which was and is exempt from taxation.

That upon said right of way and station grounds, prior to 1890, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron,
85 stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its track and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so imbedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations, above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That the property described in said assessment was and is a part and portion of the property placed upon said right of way for a railroad track upon which to operate trains, and a part of the buildings necessary in the operation of railroad trains upon said right of way; and the United States Trust Company further says that it admits that said assessor also placed upon said assessment-roll the same property under the same description as property omitted for the years 1893 and 1894, and that the property so placed by the assessor upon the assessment-roll had taxes levied upon it for the year 1895 in the sum of $30,311.74, and for the year 1893 at $15,688.36; also for the year 1894 at the sum of $15,688.36.

86 The United States Trust Company further says that included in the tax levied for the year 1895 is a tax which was properly levied upon property returned by the receivers to the assessor, the exact amount of which this defendant is unable to state, but believes it to be less than $14,000.

The United States Trust Company further says that outside of the taxes levied upon the property returned by the receivers to the assessor for taxation, each, all and every part of said taxes is illegal and void, and wrongfully levied.

Further answering, the United States Trust Company denies each and every other matter and thing in said intervening petition alleged.

The rate of taxation for the year 1895 was different from the years 1893 and 1894.

All of which matters and things hereinabove stated and set forth the United States Trust Company avers to be true, and pleads the same to said intervening bill of complaint as good and sufficient cause for refusing to pay the taxes illegally levied as aforesaid.

F. B. JENNINGS,
Solicitor for the United States Trust Company.

Service of the above answer acknowledged, and I hereby consent that the same may be filed as of March 30th, 1896.

(Signed) THOS. N. WILKERSON,
District Attorney.

(Endorsed:) Filed in my office this April 28th, 1896, as of March 30th, 1896. O. N. Marron, clerk.

In the District Court of the Second Judicial District of the
87 Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants.
} No. 1122.

Answer of C. W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, to the intervening petition of the Territory of New Mexico seeking to procure an order upon the receiver to pay certain taxes levied upon the property of the Atlantic and Pacific Railroad Company in Bernalillo county, Territory of New Mexico, for the year 1895.

C. W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, by protestation not confessing or acknowledging all or any part of the matters or things in the intervening petition of the Territory of New Mexico filed herein, to be true, in such manner and form as the same are therein set forth and alleged, does answer and plead thereto in relation to the amount of taxes alleged to have been levied or assessed for the year 1896 against the property of the Atlantic and Pacific Railroad Company, amount-
88 ing in the aggregate to the sum of $61,688.46, the following facts:

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27th, 1866, and that under and by virtue of said act and prior to the year 1894, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Bernalillo, in said Territory of New Mexico, about seventy-four miles of railroad, the exact length of which the defendant herein is unable to state; that said line of railroad so built and constructed was and is built and constructed upon the right of way granted to the Atlantic and Pacific Railroad Company under and by virtue of said act of Congress aforesaid, which said right of way was and is 200 feet in width, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turntable, and water stations; that in addition to the mileage hereinabove stated, the said railroad company has constructed nearly twenty-eight miles of side track in addition to the main track; that the said railroad company has also station-houses, shops, depots, water tanks, and improvements of like character at the stations known and called as follows:

A. & P. Junction, Mitchell, Coolidge, Wingate, Gallup, Manuelito, and Albuquerque.

That upon the right of way and station grounds of the Atlantic and Pacific Railroad Company in the county of Bernalillo, Territory of New Mexico, the said railroad company had prior to the first day of January, 1890, constructed and permanently attached to its right of way and station grounds its line of railroad consisting of ties and rails, bolts, bars, dirt, stone and culverts, sufficient to make
89 a railroad track to operate trains upon; all of which became and was a part of said right of way; it also had permanently attached to its right of way and station grounds its station buildings, depots, machine shops, water tanks and other of like character of buildings and improvements at the stations above named. It also built and permanently attached to said right of way switches, side tracks and turn-tables, so that prior to the first day of January, 1890, and ever since said time the railroad track of said company and said buildings and improvements above mentioned were and ever since said time have been permanently attached to and become a part of said right of way.

This defendant admits that receivers were and have been appointed by this court of the property of the Atlantic and Pacific Railroad Company as alleged in said intervening petition, and that this defendant is now and ever since the first day of February, 1890, has been the duly appointed, qualified and acting receiver of the property of said railroad company.

And this defendant further admits that the railroad company for the year 1893, and the receivers of its property for the years 1894 and 1895, duly made returns to the assessor of said county and Territory of the property admitted by said railroad company and by said receivers to be subject to taxation in said county and Territory, and that copies of said returns are shown by Exhibits "A," "B," and "C" to the intervening petition.

The defendant further admits that the assessor of the county of Bernalillo, during the year 1895, under instructions from the board of county commissioners, entered upon the assessment-roll of said county for said year an assessment, a true copy of which is
90 set out and set forth in the intervening petition; and this defendant alleges and shows that the action of said assessor in so making said assessment was wrong and illegal, and that each and every item of property mentioned and described in said assessment was and is a part of the right of way and station grounds of the said railroad company, and was and is exempt from taxation in this Territory by and through the provisions contained in the second section of the charter of said railroad company. That each and every of the things mentioned and described in said assessment constitutes and is a part of the line of railroad of the said railroad company, permanently attached to and permanently a part of said right of way, save and except the specific items mentioned as station-houses, depots, shops, switches, water tanks, and improvements at the different stations. That no one thing or item of property mentioned and described in said assessment was or is subject or liable to taxation in the Territory of New Mexico, and that each and every item thereof was and is permanently attached, affixed to, and was and is a part of said right of way, which was and is exempt from taxation.

That upon said right of way and station grounds, prior to 1890, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its track and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade,
91 which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so imbedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side track; and that the buildings at the stations, above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That the property described in said assessment was and is a part and portion of the property placed upon said right of way for a railroad track upon which to operate trains, and a part of the buildings necessary in the operation of railroad trains upon said right of way;

and this defendant further says that he admits that said assessor also placed upon said assessment-roll the same property under the same description as property omitted for the years 1893 and 1894, and that the property so placed by the assessor upon the assessment-roll had taxes levied upon it for the year 1895 in the sum of $30,311.74, and for the year 1893 at $15,688.36; also for the year 1894 at the sum of $15,688.36.

This defendant further says that included in the tax levied for the year 1895 is a tax which was properly levied upon property returned by the receivers to the assessor, the exact amount of which this defendant is unable to state, but believes it to be less than $14,000.

and which amount this defendant says is justly due from him
92 as such receiver, and which sum, when ascertained he is ready and willing to pay.

This defendant further says that outside of the taxes levied upon the property returned by the receivers to the assessor for taxation, each, all and every part of said taxes is illegal and void, and wrongfully levied.

Further answering, this defendant denies each and every other matter and thing in said intervening petition alleged.

The rate of taxation for the year 1895 was different from the rate for the years 1893 and 1894.

All of which several matters and things hereinabove stated and set forth this defendant avers to be true, and pleads the same to said intervening bill of complaint as good and sufficient cause for refusing to pay the taxes illegally levied as aforesaid.

C. N. STERRY,

Solicitor and of Counsel for the defendant, C. W. Smith, Receiver of the Property of the Atlantic and Pacific Railroad Company, Aforesaid.

And thereafter on the same day, to wit, the 28th day of May, 1896, there was filed in the said office of the clerk of the said court an agreed statement of facts upon which the said intervening petition was to be heard, which said agreed statement of facts is as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising Under the Constitution and Laws of the United States.

93 THE UNITED STATES TRUST COMPANY OF NEW YORK, Plaintiff, *vs.* THE ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants. } In Equity. No. 1122.

Agreed Statement of Facts.

For the purposes of the hearing to be had upon the intervening petition of the Territory of New Mexico, in the above-entitled cause,

and answers thereto of C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, and the United States Trust Company, it is hereby stipulated and agreed, by and between said above-named parties that the following facts shall be accepted and received by the judge or court in determining the questions involved as the facts in the case.

That on and prior to January 1st, 1892, the Atlantic and Pacific Railroad Company, under the provisions of its charter definitely located its line of road and right of way through Bernalillo county, which said right of way so located involved all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations. That upon said right of way so located through the city of Albuquerque in said county was definitely located necessary grounds for station buildings, workshops, depots, machine shops, side tracks, turn-tables, and water stations; and there was also located upon said right of way at the Atlantic and Pacific junction, at Chaves, or Mitchell, at Coolidge, at Wingate, at Gallup and at Manuelito, necessary grounds for
94 station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations.

That thereafterwards and prior to 1893, there was built and constructed upon said right of way by the Atlantic and Pacific Railroad Company, a railroad from a point of junction with the Atchison, Topeka & Santa Fé Railroad Company at Isleta, fifteen miles south of Albuquerque, a railroad along said right of way from said junction point to the Colorado river in the Territory of Arizona; that the Atlantic & Pacific Railroad Company has under an agreement with the Atchison, Topeka and Santa Fé Railroad Company, occupied and used the tracks of the last-named company between the junction of the two railroads at Isleta and the city of Albuquerque as and for the railroad of the Atlantic and Pacific Railroad Company to the extent that its business required the use and operation of such railroad for itself, or in other words, under contract between the two companies the railroad of the Atchison, Topeka and Santa Fé Railroad Company through the city of Albuquerque to the junction at Isleta, a distance of about fifteen miles, is jointly used by the two railroad companies; said railroad running through the reservations for machine shops, etc., aforesaid, of the Atlantic and Pacific Railroad Company at Albuquerque; that the right of way so located by the Atlantic and Pacific Railroad Company and upon which it built its railroad as aforesaid, runs through Bernalillo county, and is situated in Bernalillo county as follows:

Commencing at the A. & P. Junction referred to, it runs thence in a westerly direction four miles 3,780 feet to the division line between Bernalillo county and Valencia county, and then after crossing a portion of Valencia county at a point known as station 5,247
95 it again runs through Bernalillo county 68 miles and 44 feet to the west line of the county of Bernalillo, being the west line of the Territory of New Mexico; which said right of way, outside of the reservation for station grounds, etc., was located, and is

of the width of 200 feet, being 100 feet on each side of the center of the railroad track located thereon.

That in due time the former receivers of the property of the Atlantic and Pacific Railroad Company appointed by this court returned to the assessor of Bernalillo county as property belonging to said railroad company, taxable in said county, certain property which was and is described in said returns as follows, to wit:

List of personal property belonging to, or claimed by, or in the the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico:

The line of its road running through the counties of Bernalillo and Valencia in said Territory of New Mexico; thence through the counties of Apache, Navajo, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line, and its terminus at Mojave in said county of Kern, a total distance of 805.86 miles, the total mileage of said line owned by said company in said Territory of New Mexico being 166.6, of which 73.142 are in Bernalillo county, and 93.458 miles are in Valencia county.

And the receivers of the property of said Company make a full report of all of its personal propery as follows, to wit:

96	All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars and all other equipment owned, possessed or used by said receivers or said Company upon the entire line aforesaid	$452,960
	Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito	78,000
	Personal property within the city limits of Albuquerque	200,000
	Personal property within the city limits of Gallup	5,000

That the above and foregoing was all the property returned for taxation in Bernalillo county by said receivers or by the railroad company itself; and that the same was made as the assessment of the property of said company subject to taxation in said county for the year A. D., 1895; that the county assessor of Bernalillo county in the year 1895 under the direction of the board of county commissioners of said county, placed on the assessment-roll an assessment of property against the Atlantic and Pacific Railroad Company for the year 1893. A true and correct copy of the assessment-roll showing such assessmeut so placed thereon, is filed with this as a part hereof, and as Exhibit "1"; which said exhibit shows the taxes levied, together with the values and penalties. That at the time the said asssesor, under the instructions of said board, placed upon

said assessment-roll certain property claimed to be taxable
97 property belonging to said railroad company, which was omitted from taxation for the year 1894. A true and correct copy of the assessment so made is shown by Exhibit "2" herewith filed and made a part hereof.

That the said assessor at the same time placed upon said assessment-roll property claimed to have been omitted and belonging to said company for the year 1895, a true and correct copy of which, said assessment-roll, with said last-named assessment placed upon it, is shown by Exhibit "3" hereto attached and made a part hereof, and filed herewith.

That these Exhibits show precisely the descriptions of property entered by the assessor, the penalties added and the values, and also the taxes levied thereon. Exhibit 3 also shows the description of the property as returned by the receivers.

That all the property so placed upon the assessment-roll by the assessor, outside of that returned by the receivers, was placed upon said assessment-roll without the knowledge or consent of the receivers, or of said railroad company; that the entire property placed upon the assessment-rolls by said assessor, outside of the property returned by the receivers, constituted and constitutes an actual part and portion of the roadbed and railroad track thereon, situated on the right of way of the Atlantic and Pacific Railroad Company in Bernalillo county, in the Territory of New Mexico, and constitutes the railroad used and occupied by the Atlantic and Pacific Railroad Company under its charter and in accordance with the provisions thereof; and the machine shops, station buildings, water-tanks, section-houses and other buildings of like character connected with and a part of the machinery used in the operation of said railroad, that each and every item of property described in the
98 assessments so placed upon the said assessment-roll, outside of the property returned by the receivers, is property that is actually and permanently attached to the right of way and station grounds of the Atlantic and Pacific Railroad Company, and constitutes an actual part and portion of the superstructure placed upon said right of way by said railroad company for its railroad and for its machine shops, turn-tables, side-tracks, switches, water tanks, station buildings, and other buildings of the same class and character actually used and needed in the operation of said railroad; and that no part of the same was at the time of the placing of said assessments upon said assessment-rolls by the assessor, detached from the actual right of way and station grounds of said railroad company; but on the contrary was firmly affixed thereto; that it was described as it was by the assessor in placing the same upon the assessment-roll for the purpose of escaping the exemption from taxation contained in the second section of the act of Congress approved July 27th, 1866, known as the charter of the Atlantic and Pacific Railroad Company; the assessor desiring to assess everything placed on the right of way separate from the right of way, no matter how permanently attached and affixed to the right of way.

That during the year 1893 there were no receivers in possession

of said property, and that said railroad was being operated by the railroad company itself, and if any property was omitted to be returned for taxation which ought to have been returned to the assessor of Bernalillo county, it was the fault and neglect of the railroad company itself, and not the fault and neglect of the receivers afterwards appointed.

That at Albuquerque, upon the reservations and station grounds there was situated the largest machine shops of the said rail-
99 road company, the general office building and such buildings as pertain to the headquarters of a railroad company; said buildings and reservation constitute the headquarters of the Western division of the Atlantic and Pacific Railroad Company, and since the appointment of receivers, of the receivers operating the same.

That the assessor in placing each of these three assessments upon the assessment-rolls as stated, added to the actual value of the property one-fourth of such value, as a penalty for the failure on the part of the receiver to return such property for taxation.

That in 1893 the railroad company, and in 1894 and 1895 the receivers, omitted all property that was firmly and fixedly attached to the right of way of said railroad company and to station grounds, under the honest belief that the same constituted a part of the right of way and was exempt from taxation.

(Signed) THOS. N. WILKERSON,
Solicitor for Petitioner.
C. N. STERRY,
Solicitor for C. W. Smith, and Also in this Particular Matter for United States Trust Company.

TERRITORY OF NEW MEXICO, } ss:
Second Judicial District Court, }

I, O. N. Marron, clerk of said court, do hereby certify that Exhibits "1," "2," and "3" to the agreed statement of facts are the same as Exhibits "D," "E," and "F" to the intervening petition of the Territory of New Mexico and are hereby omitted for that reason.

O. N. MARRON, *Clerk.*

And thereafter and on, to wit: the 5th day of June, 1896, there was filed in the office of the clerk of the said court the opinion
100 of the court relative to the question of the payment of said taxes to the said intervening petitioner; which said opinion of the court is as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants.
No. 1122. Chancery.

In the matter of the intervening petition of the Territory of New Mexico for an order on the receiver to pay taxes.

Opinion of the Court.

In this case the agreed statement of facts as to the disputed tax shows that the assessment upon which it was based appeared on the roll of the assessor for Bernalillo county made up for the year 1895 under the head of "Additional assessment," appearing three times, to wit: for the years 1893, 1894 and 1895. The property under this head is listed by the assessor as "the improvements, cross-ties, rails, fish-bar plates, bolts, bridges, culverts, and structures, together with the telegraph line erected and constructed upon the right of way of the said railroad company," amounting to $475,865, and "station-houses, shops, depots, switches, water tanks, and improvements at different stations in said county,
101 amounting in the aggregate to $64,085, making in all $539,950. To this amount the assessor has added twenty-five per cent. for penalty for each of said years and the taxes extended include said penalties as part thereof.

The aggregate of property under the head of "Additional assessment" is placed in the column of the roll entitled "Value of personal property," and the agreed statement of facts recites that the receivers of the property made full report of all of its personal property being property not embraced under the head of "Additional assessment."

This agreed statement also recites that all property under the head of "Additional assessment" was property that was firmly and fixedly attached to the right of way of said railroad company and to station grounds thereon, and that the railroad company in 1893 and the receivers in 1894 and 1895 omitted to return same for taxation under the honest belief that the same constituted a part of the right of way and was exempt from taxation, the said right of way being so exempt under the second section of the charter granted by Congress.

The first and principal question raised upon said intervening petition is as to the liability of the railroad company at all for any tax upon the property listed by the assessor under the head of "Additional assessment" because of the exemption from taxation of right of way of said railroad company.

I have already held in an intervening petition filed in the case of The Mercantile Trust Company against The Atlantic and Pacific

Railroad Company by the collector of the county of Valencia that the grant of exemption from taxation of the right of way of said railroad company does not extend to the superstructure placed thereon. This conclusion was arrived at, as being in obe-
102 dience to the doctrine emphasized in repeated decisions of the Supreme Court of the United States extending from a period long prior to the date of said company's charter to the latest decision called to my attention being the case of Wilmington & W. R. R. Co. *vs.* Alsbrook, 146 U. S., 279, rendered in 1892. In the case cited the court say speaking by Chief Justice Fuller "The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power." Here it might be reasonably contended, I think, that the exemption from taxation of a right of way means merely the soil constituting the right of way, and the learned Chief Justice says in such case "The conclusion is inevitable in favor of the reservation of the power" to tax.

It is also urged, though I cannot think plausibly, that the designation by the assessor of this property as personal property invalidates the assessment. It is not pretended that this makes any difference in the extension of the taxes, or that it serves in any way to mislead as to what property is meant, and I therefore cannot see that there is any error here of any material-ty.

The question of penalty is one that calls for some consideration of our statute. The assessor in listing this property as omitted property proceeded under section 2847, C. L. N. M., 1884, which required him to place it "upon the assessment-roll before the same is returned to the board of county commissioners, with all ar-
103 rearages of taxes which should have been assessed and paid in former years charged thereon," and in extending the taxes he added a penalty of twenty-five per cent. to the value of this omitted property.

The authority for this penalty is claimed to be found in section 2825, which reads as follows: "If any person liable to taxation shall fail to render a true list of his property as required by the preceding three sections, the assessor shall make out a list of the property of such person and its value according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to a penalty of twenty-five per cent. thereof, which shall be assessed and collected as a part of the taxes of such person." A reading of this section shows, when taken in connection with 2826, that the penalty which is visited upon such delinquent is the adding to his entire taxes twenty-five per cent. for a particular year. In section 2826 the language is a penalty of twenty-five per cent. to be added to the amount of the taxes assessed upon the true amount and value of his property. Those who make no return whatever and those who make a false return are placed in the same condition.

The assessor's duty in each instance is the same, viz: "To make out a list" himself.

For the years 1893 and 1894 the assessor accepted the list made out by the tax-payer and taxes were extended thereon and collected. It can hardly be said that afterwards a penalty of twenty-five per cent. upon the listed and omitted property should be collected, and yet the statute provides only for that kind of penalty. If there is no authority to collect the full penalty, I do not see how it can be inferred from any clear statutory provision that anything less than such full penalty is collectible. That this construction is correct seems to me to be enforced by the reading of section 2848,
104 which provides in effect, that if after the tax-list has been delivered to the collector he discovers omitted property he may assess the same. There is no warrant anywhere for the collector's changing the roll in any other respect. To carry section 2848 back to section 2825 for the purpose of adding penalty seems to me not allowable under fair construction. I think that when the year had passed and taxes had been actually paid, a status had been acquired by the tax-payer which prevented going back and visiting a penalty, the authority for which rested only in inference. To levy a penalty the authority under the statute should be clear and unambiguous. I think therefore that as to the years 1893 and 1894 no penalties are assessable or collectible.

As to the year 1895 I am of the opinion that the case stands somewhat different. The assessment should be viewed as one of property listed by the assessor and not by the receivers, and the only error made in that consists in the fact that the penalty should have been on the entire assessment and not on the omitted portion. This being an error in favor of the receivers, where a right to fix a larger penalty existed, cannot be objected to by them.

As to the interest claimed on delinquent taxes, I am of the opinion that it should be allowed, and the intervening petition will be referred to the special master in this cause to report what taxes, penalty and interest are due in accordance with this opinion, and when report is made a decree will be entered.

This opinion will be filed in the case for the guidance of said special master.

(Signed) N. C. COLLIER, *Judge.*

And thereafter and on, to wit, the 25th day of June, 1896,
105 there was made and entered of record in the said cause a decree of the court in the matter of the intervening petition of the Territory of New Mexico, which said decree is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY *et al.*, Defendants.
No. 1122.

In the matter of the intervening petition of the Territory of New Mexico for an order on the receiver to pay taxes.

This cause having heretofore come on to be heard before the court, upon the intervening petition of the Territory of New Mexico for an order upon the receiver heretofore appointed in this cause to pay certain taxes levied and assessed in the county of Bernalillo in this judicial district, and upon the answer of the receiver, the answer of the complainant in the said cause, and the exhibits annexed to the said petitions and to the said answer, and upon the agreed statement of facts signed by the solicitors for the respective parties herein, and the court having heard the arguments of
106 said solicitors, the said complainant, The United States Trust Company appearing by C. N. Sterry and the said receiver by his solicitor, C. N. Sterry, Esq., and the said intervening petitioner by its solicitor, Thos. N. Wilkerson, Esq., and the same having been taken under advisement by the court, the court being now sufficiently advised in the premises,

It is ordered, adjudged and decreed, as follows, to wit:

First. That the additional assessment of $539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1893, is a valid assessment, and the tax levied thereon for the said year is a valid lien upon the property and franchises of the said railroad company, now in the custody and control of the receiver of this court.

Second. That the additional assessment of $539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1894, is a valid assessment, and the tax levied thereon for the said year is a valid lien upon the property and franchises of the said railroad company, now in the custody and control of the receiver of this court.

Third. That the additional assessment of $539,950, together with a twenty-five per cent. penalty added to said amount, levied and assessed by the assessor of the county of Bernalillo for the year 1895, is a valid assessment and that the tax levied thereon for the said year 1895 is a valid lien upon the property and franchises of the said railroad company now in the custody and control of the receiver of this court.

It is further ordered, adjudged and decreed by the court that the said matter of the intervening petition of the Territory of New Mexico be and it is hereby referred to Owen N. Marron, special

master in the above-entitled cause, to report to the court
107 what taxes, penalty and interest are due from the said railroad company and from the said receivers heretofore appointed for the years 1893, 1894 and 1895 respectively.

And the said master having here now filed his report as to the amount of taxes due to the said petitioner and having reported that the amount of taxes due for the year 1893, without penalty, is the sum of $13,900.78, and for the year 1894, without penalty, is the sum of $12,768.78, and for the year 1895, is the sum of $16,585.14, making a total of the amount of taxes due to the said petitioner for the years 1893, 1894 and 1895, of $43,254.70. The court being fully advised, it is further ordered, judged and decreed that the said report of the said special master be and the same is hereby approved and confirmed.

It is further considered, adjudged and decreed by the court that the receiver herein forthwith pay to the county collector of the said county of Bernalillo, the said sum of $43,254.70, being the amount of taxes due from the said railroad company and the receiver thereof for the said years 1893, 1894 and 1895, and that he take the receipt of the said collector therefor.

And thereupon comes the complainant, The United States Trust Company of New York, and also comes C. W. Smith, as receiver, and each of said parties prays an appeal herein from the judgment and decision of the court, requiring the receiver to pay the taxes, to the supreme court of the Territory of New Mexico, and the court being duly advised in the premises, orders, adjudges and decrees that an appeal herein be, and it is hereby granted to the complainant, The United States Trust Company, and also to the said C. W. Smith, as such receiver, from the judgment and decision of the court herein, to the supreme court of the Territory of New Mexico.

108 And it is further considered and adjudged, that, as the property upon which said taxes were levied, and the funds wherewith to pay the same are in the custody and control of this court, that, pending the final determination of the appeals herein granted, the execution of this decree be stayed without giving any supersedeas.

N. C. COLLIER, *Judge.*

TERRITORY OF NEW MEXICO, } ss:
Second Judicial District Court, }

I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the above and foregoing is a true, correct and complete transcript of the record and proceedings had in the matter of the intervening petition of the Territory of New Mexico in a cause pending in said court entitled The United States Trust Company of New York against The Atlantic and Pacific Railroad Company and others, No. 1122, according to the stipulation of the respective parties on file in said cause, as to what should constitute the record on appeal from the judgment of the court in the matter of the said intervening petition.

In witness whereof, I have hereunto set my hand
[SEAL.] and affixed the seal of the said court this 29th day of June, 1896.

O. N. MARRON, *Clerk.*

109 And afterward, to wit, on July 25th, 1896, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors are in the words and figures following, to wit:

THE UNITED STATES TRUST COMPANY, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*, Defendants.

In the matter of the intervening petition of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. Smith, Receiver of the Property of the Atlantic & Pacific Railroad Company, Appellants,
vs.
THE TERRITORY OF NEW MEXICO, Appellee.

Joint and several assignment of errors on behalf of the appellants.

110 *Assignment of Errors.*

First. That the court below erred in holding that the additional assessment of $539,950.00 levied and assessed by the assessor of the county of Bernalillo for the year 1893, as property omitted for that year and placed upon the assessment-roll for the year 1895, was a valid assessment, and that the tax levied thereon in the year 1895, was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

Second. That the court below erred in holding that the additional assessment of $539,950.00, levied and assessed by the assessor of the county of Bernalillo, for the year 1894, as property omitted for that year and placed upon the assessment-roll for the year 1895, was a valid assessment, and that the tax levied thereon in the year 1895, was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

Third. That the court below erred in holding that the additional assessment of $539,950.00, together with the 25 per cent. penalty added to such amount levied and assessed by the assessor of the county of Bernalillo as property omitted to be returned for the year 1895, was and is a valid assessment, and that the tax levied thereon for the said year 1895, is a valid lien upon the property and franchises of the said railroad company now in the custody and control of the court.

Fourth. The court below erred in holding and decreeing that the receiver should pay to the treasurer of the county of Bernalillo the

sum of $43,254.70, as taxes due from the Atlantic & Pacific
111 Railroad Company and the receiver thereof for the years 1893, 1894 and 1895, upon property placed on the assessment-roll by the assessor of Bernalillo county as omitted property, and erred as to the amount ordered to be paid as taxes for each of said years.

C. N. STERRY,
KARL A. SNYDER,
Solicitors for the Receiver, C. W. Smith, Appellant.
EDWARD W. SHELDON,
FREDERICK B. JENNINGS,
Solicitors for the Complainant, The United States Trust Company, Appellant.

112 And afterwards, at a regular term of the supreme court of the Territory of New Mexico begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday of July, 1896, the same being Monday, July 27th, 1896, on the fourteenth day of said term, the same being Tuesday, August 11th, 1896, the following, among —, proceedings were had, to wit:

THE UNITED STATES TRUST COMPANY OF NEW YORK *vs.* ATLANTIC & PACIFIC R. R. Co. *et al.*	No. 670. Appeal from Bernalillo County.

In the matter of the intervening petition of The Territory of New Mexico, appellee; The United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic & Pacific R. R. Co., appellants.

It is ordered by the court that this cause be, and the same hereby is, set down for hearing at the foot of the docket upon Tuesday, August 18th, 1896.

113 And afterwards, on the twenty-second day of said term of said court last aforesaid, the same being Thursday, August 20th, 1896, the following, among other, proceedings were had, to wit:

THE UNITED STATES TRUST COMPANY OF NEW YORK *vs.* ATLANTIC AND PACIFIC R. R. Co. *et al.*	No. 670. Appeal from Bernalillo County.

In the matter of the intervening petition of The Territory of New Mexico, appellee; The United States Trust Co. of New York and C. W. Smith, receiver of the property of the Atlantic and Pacific R. R. Co., appellants.

This cause, coming on for hearing upon the transcript of record, assignment of errors, and briefs of counsel on file, is argued by C. N. Sterry, Esq., for said appellants, and by F. W. Clancy and Thomas

N. Wilkerson, Esqrs., and John P. Victory, Esq., for appellees, and the court hears a portion of the arguments.

And afterwards, on the twenty-third day of the term of court last aforesaid, the same being Friday, August 21st, 1896, the following, among other, proceedings were had, to wit:

114 THE UNITED STATES TRUST COMPANY OF NEW YORK *vs.* ATLANTIC AND PACIFIC R. R. Co. *et al.* — No. 670. Appeal from Bernalillo County.

In the matter of the intervening petition of The Territory of New Mexico, appellees; The United States Trust Co. of New York and C. W. Smith, receiver of the property of the Atlantic and Pacific R. R. Co.

This cause, coming on for further hearing, is argued by said attorneys and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on the forty-fourth day of the term of court last aforesaid, the same being Friday, December 18th, 1896, the following, among other, proceedings were had, to wit:

115 THE UNITED STATES TRUST COMPANY of New York and C. W. Smith, Receiver of the Property of the Atlantic and Pacific R. R. Co., Appellants, *vs.* ATLANTIC AND PACIFIC R. R. Co. *et al.* — No. 670. Appeal from Bernalillo County.

In the matter of the intervening petition of The Territory of New Mexico, appellee.

This cause having been argued by counsel and submitted to and taken under advisement by the court at a former day of this term, and the court, being now sufficiently advised in the premises, announces its decision by Chief Justice Smith, Associate Justices Laughlin and Hamilton concurring, Associate Justice Bantz concurring as to the ("exemptions of the right of way, including the road-bed, ties, culverts, bridges, etc., but dissents as to the exemptions of the grounds necessary for station-houses, workshops, depots, etc., or the improvements thereon,") reversing the decree of the court below in this cause for reasons stated in the opinion of the court on file. It is therefore considered, adjudged, and decreed
116 by the court that the decree of the district court within and for the second judicial district of the Territory of New Mexico from which the appellants in this cause appealed to this court be, and hereby is, reversed and set aside, and in accordance therewith it is ordered that the intervening petition of The Territory of New Mexico, the appellee herein, filed in said cause in said district court be, and the same is hereby, denied and dismissed, and that the said

appellee take nothing thereby, and that the said The United States Trust Company of New York and C. W. Smith, as receiver of the property of the Atlantic and Pacific Railroad Company, appellants herein, do have and recover of and from the said appellee their costs in this behalf expended, including all their costs in the court below as well as those in this court, and that execution issue therefor. The court doth find further that the right of way of the Atlantic and Pacific Railroad Company consists of one hundred feet in width on each side of its track, the road-bed, track, ties
117 and rails, and all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, and the road-bed, ties, rails, bridges, culverts, telegraph line, station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, water tanks, and improvements thereon and attached thereto for the purpose of operating, maintaining, and enjoying said railroad and telegraph line, and the said right of way as above designated is exempt from taxation within the Territory of New Mexico under and by virtue of the act of Congress approved July 27th, 1866, incorporating said company; and the court doth further find that the assessment for taxation of said right of way and necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations and of the improvements placed thereon in the county of Bernalillo, New Mexico, for the years 1893, 1894, and 1895 was and is illegal and void, and all taxes and penalties levied thereon for said years were and are unlawfully and illegally levied and assessed and are void.

118 And afterwards there was filed, on December 28th, 1896, in the office of the clerk of the supreme court of the Territory of New Mexico a petition for rehearing; which said petition is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1896.

TERRITORY OF NEW MEXICO, Intervenor and Appellee,
vs.
ATLANTIC & PACIFIC RAILROAD, Appellant.

Now comes the said intervenor and appellee, by her solicitor general, John P. Victory, Esq., and prays the court to set aside the decree entered herein at a former day of the present term and to grant a rehearing upon the said appeal for the following reasons:

1. As one of the things essential to the opinion of the court, the court declares that territorial governments possess neither sovereignty nor prerogative, but enjoy by the grace of Congress privi-
leges enumerated in the charter of their existence, and has
119 evidently overlooked the fact that by authoritative decisions of the Supreme Court of the United States it has been in effect declared that territorial legislatures possess practically unlimited power, subject only to such restrictions as have been declared

by Congress in its statutes and as are to be found in the Constitution of the United States.

Hornbuckle *vs.* Toombs, 18 Wal., 655–'6.
Clinton *vs.* Engelbrecht, 13 Wal., 434.

2. The court holds in effect that the legislative power of a Territory is of a very narrow and limited character, because it is subordinate to the authority of Congress, whereas the legislative power of a Territory within the few limitations imposed by Congress is as great as that which Congress itself might exercise.

See cases above cited.

3. The court applies to a statutory exemption from taxation the liberal rule of construction adopted by the Supreme Court of the United States as to statutory donations or gifts, such as grants of land, such application being contrary to all the decisions of said Supreme Court as to exemption from taxation.

120 4. The court expands a legislative exemption of a right of way from taxation to an exemption of every kind of property which the railroad company can possibly possess, except, perhaps, its rolling stock, and it is not clear that the reasoning of the court as to the intent of Congress will not require the exemption even of the rolling stock.

5. The reasoning of the court as to the probable intent of Congress in exempting the right of way from taxation and its conclusion that to limit the exemption to the letter of the statute would be in contravention of the spirit that actuated Congress in granting the franchise lose their force when attention is called to the fact that such exemption was a matter of minor importance, and that other privileges and powers, such as the power of eminent domain and the donation of materials to be taken from the public lands and of an enormous quantity of land, amounting to many millions of acres, were conferred and given by the act of Congress creating the railroad company.

121 In other words, the opinion of the court magnifies the importance of what was by its language an insignificant provision of the statute and does so for the avowed purpose of effectuating the intent and spirit of the act of Congress, as though there were nothing else in the act to accomplish that purpose, when, as a matter of fact, the other valuable privileges and donations are much more than enough to give full effect to what Congress intended.

JNO. P. VICTORY,
Solicitor General for New Mexico.

THOS. N. WILKERSON,
FELIX H. LESTER,
F. W. CLANCY,
Counsel.

122 And afterwards, on February 4th, 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certificate of counsel on motion for rehearing; which said certificate is in the words and figures following, to wit:

In the Supreme Court of New Mexico, July Term, A. D. 1896.

TERRITORY OF NEW MEXICO
vs.
ATLANTIC & PACIFIC R. R. Co. *et al.* } No. 670.

We do hereby certify that the petition for a rehearing heretofore filed in the above-entitled cause is in our opinion well founded in matter of law; that it is made in good faith, and that it is not for any purpose of delay.

JNO. P. VICTORY,
Solicitor General for New Mexico.

THOS. N. WILKERSON,
F. W. CLANCY,
FELIX H. LESTER,
WM. H. POPE,
Counsel.

123 And afterwards, on March 1st, 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion praying for an appeal; which said motion is in words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico.

THE TERRITORY OF NEW MEXICO, Intervenor and Appellee,
vs.
THE ATLANTIC AND PACIFIC RAILROAD, Appellant. } No. 670.

The above-named The Territory of New Mexico, by her solicitor general, John P. Victory, conceiving herself aggrieved by the judgment entered herein on December 18th, 1896, in the above-entitled cause, doth hereby appeal from said judgment to the Supreme Court of the United States, and prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was entered, duly authenticated, may be sent to the Supreme Court of the United States.

JNO. P. VICTORY,
Solicitor General of New Mexico.

124 And afterwards, on the forty-seventh day of the term of court last aforesaid, the same being Monday, March 1st, 1897, the following, among other, proceedings were had, to wit:

THE UNITED STATES TRUST COMPANY OF New York and C. W. Smith, Receiver of the Property of the Atlantic and Pacific Railroad Company, Appellants,
vs.
ATLANTIC AND PACIFIC RAILROAD COMPANY.

No. 670. Appeal from District Court of Bernalillo County.

In the matter of the intervening petition of the Territory of New Mexico, appellee.

This cause coming on to be heard on the application of counsel for appellee for leave to amend its motion for rehearing heretofore filed by filing a certificate of counsel, as provided by the rule of this court, it is ordered by the court that said appellee be, and it is hereby, granted leave to file said certificate of counsel; and it is further ordered by the court that the motion for rehearing herein be, and the same is hereby, denied, and thereupon the appellee moves the court for an appeal from the judgment and de-
125 cision of this court to the Supreme Court of the United States, and the court, being fully advised in the premises, grants said appeal. It is therefore considered and adjudged by the court that the appellee herein, The Territory of New Mexico, be, and it is, allowed an appeal from the judgment and decision of this court to the Supreme Court of the United States.

126 And afterwards there was filed on March 10th, 1897, in the clerk's office of clerk of the supreme court of the Territory of New Mexico, a citation to U. S. Supreme Court; which said citation is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To the United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on, to wit, sixty days from and after the date of the signing of this citation, pursuant to an appeal allowed by the supreme court of New Mexico on the first day of March, A. D. 1897, wherein The Territory of New Mexico is appellant and you are respondents and appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

127 Witness the honorable chief justice of the supreme court of New Mexico this 6th day of March, A. D. 1897.

THOMAS SMITH,
Chief Justice Supreme Court of New Mexico.

I hereby acknowledge service of the foregoing citation for and on behalf of said respondents and appellees.

C. N. STERRY.
KARL A. SNYDER.

Mar. 8, 1897.

128 And heretofore, to wit, on the 18th day of December, A. D. 1896, there *was* filed in the office of the clerk of the supreme court of the Territory of New Mexico the opinions of the judges of said court in said cause, which *is* herewith annexed and transmitted with this record in accordance with the rules of the Supreme Court of the United States; which said opinions are in the words and figures as follows, to wit:

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*
No. 670.

In the matter of the intervening petition of The Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, as Receiver, Appellants,
vs.
THE TERRITORY OF NEW MEXICO, Appellee.

Statement of the Case.

This is an appeal from an order of the district court of Bernalillo county, sitting as a court for the hearing and trial of causes
129 arising under the Constitution and laws of the United States, taken by the receiver appointed by it of the property of the Atlantic & Pacific Railroad Company and by The United States Trust Company, complainant in that action. The order required the receiver to pay to the treasurer of Bernalillo county taxes aggregating the sum of $43,254.70, which were levied upon property placed upon the assessment-roll in the year 1895 by the assessor as property omitted by the railroad company to be returned for the year 1893, as property omitted to be returned for the year 1894, and as property omitted to be returned for the year 1895, with 25 per cent. penalty added for the year 1895, the separate amounts of this aggregate being $13,978.00 for 1893, $12,768.78 for the year 1894, and $16,585.14 for the year 1895.

The Atlantic & Pacific Railroad Company was incorporated by the act of Congress of the United States approved July 27th, 1866. Among the provisions contained in its charter was the provision contained in section one, authorizing the company to lay out,
130 locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line from Springfield, Missouri, to the Pacific ocean, practically along the thirty-fifth parallel of latitude, and granting to it in the second section a right of way through the

public lands two hundred feet in width, with sufficient grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; also the power to acquire a right of way and station grounds of the same character through private lands by condemnation proceedings provided for in the act.

The second section of the act exempted from taxation within the Territories of the United States the right of way. The sections referred to and others of the character are hereafter in the brief set out in full.

The Atlantic & Pacific Railroad Company afterwards constructed its line of road from Isleta Junction (15 miles west of Albuquerque) to the Colorado river, and maintained and operated the same to such point and beyond from the year 1882 up to the present time,
except that in January, 1894, receivers were appointed in
131 foreclosure proceedings, commenced in the second judicial district court of the Territory of New Mexico, for the property of the Atlantic & Pacific railroad, and such receivers took possession of and operated said railroad up to February 1st, 1896, when in another foreclosure proceeding and in the same one the present receiver, C. W. Smith, was appointed receiver of the property of the Atlantic & Pacific Railroad Company in New Mexico, Arizona, and California.

In the year 1893 the railroad company returned for assessment to the assessor of Bernalillo county property of the value of $530,960.00, and for the year 1894 the receivers returned property to the same value, and for the year 1895 the receivers returned property to the same value; that during none of these years was the right of way, station grounds, or superstructure thereon returned for taxation by the company or by the receivers, as each claimed that the same was exempt from taxation.

In the year 1895 the assessor of Bernalillo county, under
132 instructions of the board of county commissioners, assessed as personal property (describing the same as such) the entire superstructure of the railroad on its right of way and station grounds in Bernalillo county, although each and every part of the property so described and assessed was attached to and a part of the right of way and station grounds of the railroad company. A tax was levied upon each of these assessments, and subsequently, in March, 1896, the Territory, upon permission of the court, filed in the foreclosure case of the United States Trust Company an intervening petition to recover such taxes (printed Tr., pp. 56 to 57). An order to show cause why the intervening petition should not be granted was properly served upon the parties to the foreclosure suit, and subsequently The United States Trust Company, the complainant in the foreclosure suit, and C. W. Smith, the receiver appointed in such suit, filed answers showing cause why the intervening petitions should not be granted. (Printed Tr., pp. 78 to 89.)

Subsequently an agreed statement of facts was made between the
parties and the cause submitted and heard upon such agreed
133 statement of facts. (See printed Tr., pp. 90 to 96, inclusive.) Subsequently the court found that these assessments were

valid and ordered the receiver to pay out of the property and funds in his hands the sum of $43,254.70 (printed Tr., pp. 97 to 105, inclusive) to the treasurer of the county. A stipulation was made between the parties, in which the Territory entered its appearance herein and in which it was agreed as to the parts of the record which should constitute a transcript in this case. (Printed Tr., pp. 4 to 5, inclusive.)

Assignment of Errors.

First. That the court below erred in holding that the additional assessment of $539,950.00, levied and assessed by the assessor of the county of Bernalillo for the year 1893, as property omitted for that year and placed upon the assessment-roll for the year 1895 was a valid assessment, and that the tax levied thereon in the year 1895 was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

Second. That the court below erred in holding that the
134 additional assessment of $539,950.00, levied and assessed by the assessor of the county of Bernalillo for the year 1894, as property omitted for that year and placed upon the assessment-roll for the year 1895 was a valid assessment, and that the tax levied thereon in the year 1895 was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

Third. That the court below erred in holding that the additional assessment of $539,950.00, together with the 25 per cent. penalty added to such amount, levied and assessed by the assessor of the county of Bernalillo as property omitted to be returned for the year 1895 was and is a valid assessment, and that the tax levied thereon for the said year 1895 is a valid lien upon the property and franchises of the said railroad company now in the custody and control of the court.

Fourth. The court erred in holding and decreeing that the receiver should pay to the treasurer of the county of Bernalillo
135 the sum of $43,254.70, as taxes due from the Atlantic & Pacific Railroad Company and the receiver thereof for the years 1893, 1894, and 1895, upon property placed on the assessment-roll by the assessor of Bernalillo county as omitted property, and erred as to the amount ordered to be paid as taxes for each of said years.

Opinion.

SMITH, *C. J.*:

It has been adjudicated by the court of last resort, "Railroad Company *vs.* Peniston, 18 Wallace, page 5," that the States can impose a tax upon the property of corporations chartered by Congress, as agents, to subserve the lawful purposes of the Government, provided that such tax does not deprive such organizations of the power to serve the Government as they were intended to serve it or does not hinder the efficient exercise of their power. It is difficult to appreciate that the legality of a tax must be determined by its effect;

that its constitutionality is contingent upon its operation, and it is suggested that if such consideration is decisive the issue is not one of right, but of feasibility. The same case affirms the distinction before made by the said tribunal between the franchise and
136 the property of such corporations, pronouncing the one exempt from taxation by the States and the other liable to assessment, upon the ground that the one is upon the operations of said corporations and the other upon their possessions—their property—it being represented that existence in the one case is involved, but in the other efficiency only.

If the tax is right or wrong, legal or unauthorized, according to its effect, it would seem that it can be placed upon the franchise, as well as upon the property, provided it should not deprive the corporations of the power to fulfill the purposes for which they were created by Congress. Banks are not rendered inefficient or failures by a tax upon the right to do business, nor are railroads forced into liquidation by the exactions of the States whose area they traverse.

However, *res adjudicata* by the Supreme Court of the United States constitutes the law, and it is now established as the attribute of the nominal sovereignty of States that they are supreme in their power of taxation upon the property within their jurisdiction, with the qualification, however, that they cannot so exercise this power as to arrest or impair the operations of the General Government;
137 but it is yet to be determined whether the Territories are equally absolute in their domain. Territorial governments are the anomalous creatures of the Congress of the United States, conceived, presumably, from the necessity of the conditions; they possess neither sovereignty nor prerogative, but enjoy by the grace of Congress privileges specifically enumerated in the charter of their existence.

It cannot be conceived that Congress in any contingency contemplated that the Territories should assume powers which it surrendered in the interest of the public or interfere with its policy for the country's comfort and safety. It would not be legitimate for Congress to confer franchises accompanied with inducements to procure their acceptance and to promote their operation, and, having received the desired and expected benefits, to repudiate the favors granted, and it would seem that to allow the Territories to ignore its guaranty would be not less culpable than to do it itself.

Section 20 of the act incorporating the Atlantic and Pacific Railroad Company declares the object of the act to be to promote the public interest and welfare by the construction of said railroad
138 and telegraph line and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes. Congress deemed it paramount for the country to be so connected with its exposed western coast that it could be protected in the event of hostilities, and, recognizing the probability of antagonism of interests between the sections remote from each other and without the facility of communication, incorporated the Atlantic and Pacific Railroad Company to construct a railroad and

telegraph line, and to promote the accomplishment of said object bestowed privileges upon said company in the interest of the welfare of the public and to secure to the Government at all times the use and benefit of such road for postal, military, and other purposes.

Section two of said act of incorporation is as follows:

"And be it further enacted, That the right of way through the public lands be, and the same is hereby granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for
139 the construction of a railroad and telegraph as proposed. * * * Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations; and the right of way shall be exempt from taxation within the Territories of the United States."

Section 3 of said act grants "to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches," alternate sections of the public domain. It is manifest that Congress appreciated the magnitude of the enterprise proposed, and recognized that the expenditure and difficulties involved would not be encountered except for substantial advantages that might eventually be profitably utilized. It be-
140 stowed franchises that contained privileges, and yet so connected with burdens, it recognized that one would not be available unless there was partial relief from the other by exemption from taxation and the donation of land.

The right of way was granted and its exemption from taxation within the Territories of the United States declared. It must be recognized that Congress acted in good faith, and intended to contribute material, not nominal assistance, to the company for the construction of the railroad and telegraph line for the convenience of the Government at all times and in the interest and welfare of the public. The alternate sections were granted to aid, it may be said, to secure the construction of said railroad for the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of the said line of railway, and doubtless the right of way exempt from taxation was conceded to encourage the company to embark in the hazardous experiment. Congress, presumably being cognisant of the character of the country along the 35th parallel of latitude, cannot
141 be suspected in giving a right of way to have intended to convey valueless barren land only, as such consideration would neither encourage nor aid in the construction of the railroad. Congress, in announcing the object of the act of incorporation, distinctly discloses that it regarded the construction of a railroad between the proposed termini a necessity so imperative that it reserved

the right to make any alterations or amendments to the act to promote the accomplishment of its object or to repeal it altogether should it prove an obstacle to the construction of the said road; and it is logical, indeed inevitable, that the concessions to the company should be construed with a view to carry out the congressional conception. The right of way granted is practically nothing, if merely the one hundred feet on either side of the roadway, and it is plain that such restriction would be in contravention of the spirit that actuated Congress in granting the franchise, and it may be that if such construction had been apprehended the franchise would have been neither sought nor accepted. Congress proposed the
142 construction of the railroad for the lawful purposes of the Government and for the interest and welfare of the public, and tendered the inducements it deemed sufficient to secure it—not the right of way over the land, but the right for a railway; not the right to the soil only, but the right to a road-bed; not the right to a road-bed only, but to a road-bed equipped with ties and rails to constitute a railway over which cars could be conducted for the lawful purposes of the Government; not only the right to a road-bed so furnished, but to a railroad provided with the fixtures essential to the fulfillment by the corporation of the purposes for which it was created. If such were the purpose of Congress it should be deferred to by the Territories, and no attempt inconsistent with it is legitimate. Congress, having secured for the country a valuable connection in the system uniting the two oceans, recognized that it has received full consideration for the privileges conferred and has not attempted to impair them, and it seems that the Territories having received incalculable advantages from the construc-
143 tion of the railroad through an area that appeared irredeemable, rendering it practicable for occupation and creating opportunities for the development of its resources, should not only forbear the effort to impose burdens upon it, but should foster it by generosity in the recognition of its rights and in the bestowment of favors. The intention of Congress should be broadly recognized and its spirit graciously respected.

We have indulged in these observations as suggestive of the considerations which should be potential in the construction of the act in question, and we will not apply them. It does not appear material whether the grant of the right of way created a fee or an easement, as in either event the exemption from taxation attaches. It is difficult, however, to conceive any reason for the contention that the grant by Congress of a right of way for the construction of a railroad does not operate commensurately with all other grants from the Government. Grants of land by Congress to aid in the construction of a railroad surrender the title of the Government, and the lands do not revert, after condition broken, until for-
144 feiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose or through some legislation equivalent to a judgment of office found at common law. St. Louis Railroad Company *vs.* McGee, 115 U. S., p. 469 to 473.

It will be deemed, it is to be presumed, that the right of way was granted to the "A. & P." corporation to aid in the construction of a railroad, and it cannot be legitimately contended that the lands so conveyed could revert to the Government upon condition broken except through proceedings instituted by the Government. The United States only can enforce forfeiture of its lands granted, and the title to the right of way must, consequently, remain in the grantees until the grantor resumes it on account of the grantees' failure to earn it. No individual can assail the title of the Government as conveyed on the ground that the grantee has failed to perform the conditions annexed. 21 Wall, p. 44.

Railroad *vs.* Baldwin, 103 U. S., 430, contains the following:

145 "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the lands. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route."

In Bybee *vs.* Oregon & California Railroad Co., 139 U. S., p. 679, it is declared that the distinction between a right of way over the public lands and lands granted in aid of the construction of the road is important in this connection. As to the latter the rights of settlers and others who acquire lands by purchase or occupation between the passage of the act and the actual location and identification of the lands are preserved unimpaired, while the grant of the right of way is subject to no such condition. It will be observed

146 that these decisions establish that the grant of a right of way is, if anything, more absolute and of greater degree than the grants of alternate sections of land.

The Supreme Court of the United States in Railroad Company *vs.* Baldwin, 103 U. S., 429, has declared that acts similar to that under consideration are a present grant and import a transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act. It says: "The grant of the right of way by the 6th section contains no reservations or exceptions; it is a present, absolute grant, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purposes designated; nor *it* there anything in the policy of the Government with respect to the public land which would call for any qualification of the term.

These lands would not be the less valuable for settlement by a road running through them; on the contrary, their value would be greatly enhanced thereby."

Says the court in the opinion above referred to, 139 U. S., p. 674:

147 "The act making the grant in aid of this road does not in its words of conveyance differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered

by this court as taking effect *in præsenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located and the map is filed with the Secretary of the Interior."

In 152 U. S., p. 116, Missouri, Kansas and Texas Railway *vs.* Roberts, it is announced, not as *obiter dictum*, but as the court's conclusion upon an issue involved, that the right of way granted by Congress to the Missouri, Kansas & Texas railway, through lands reserved for the use and occupation of the Osage Indians, vested the title to the lands appropriated for said way, to wit, 200 feet in width, in said company, either upon the passage of the act or the construction of the road.

The supreme court of Oklahoma, on Sept. 10, 1896, decided as follows in the case of Churchill *vs.* Choctaw R'y Co.:

148 "An act of Congress investing and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using, and maintaining a railway through and over public land, and providing that said company is authorized to take and use for all purposes of a railroad a right of way over said public land, is a present, absolute grant."

We can but accept these authorities as conclusive as to the effect of a grant of a right of way by Congress to aid in the construction of a railroad through the public domain. That the title of the Government to the lands granted to the company passes absolutely to the company, we must regard as adjudicated, and we will now address ourselves to the consideration of the elements that compose a right of way as intended by Congress.

The general rule is that fixtures once annexed to the freehold become part of the realty when the intention is clear that it should be permanently connected with it.

It will not be contended that the ties and rails were temporarily affixed to the road-bed or that they could be removed with-

149 out material injury to the freehold. Being annexed to the road-bed for continuous use and the road-bed being valueless without them, they become as much a part of the right of way as the road-bed. Attached to the road-bed they are absolutely subject to the mortgages on the road at the time of their attachment, and foreclosure involves them no less than the road-bed. Says the Supreme Court of the United States in Porter *vs.* Pittsburg Bessemer Steel Co., 122 U. S., p. 267, 283:

"Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors as against any contract between the furnisher of the property and the railroad company containing stipulations" that the title to the property shall not pass till the property is paid for and reserving to the vendor the right of removing the property.

In United States *vs.* New Orleans Railroad Company, 12 Wall., p. 362, it is stated that if the company give a mortgage for the purchase-

150 money at the time of the purchase, such mortgage, whether registered or not, has precedence of the general mortgages. This rule, however fails when the property purchased is an-

nexed to a subject already covered by the general mortgage and becomes part thereof, as when iron rails are laid down, and becomes part of the railroad.

In the case of The United States *vs.* Denver & Rio Grande Railway, 150 U. S., p. 12, it is declared that all necessary appurtenances of all railroads may fairly — regarded as parts or portions of the railroad whose construction it was the purpose of Congress to aid.

In its ordinary acceptation and large sense the term "railroad" fairly includes all structures which are necessary and essential to its operation. As already stated, it was not the intention of Congress to aid in the mere construction of the road-bed or roadway, but to aid in the construction of the railroad as such, which term has a far more extended signification than the mere track or roadway. If the language of the act had shown an intention merely to aid in the construction of the road-bed or roadway it is clear
151 that such structures as station-houses, etc., would not have — included, etc.

It is true that the exemption from taxation by a State is construed with strictness in favor of a State, but it will be observed that this discrimination exists where the exemption is the act of the State as to the property within its jurisdiction, not a privilege derived from the General Government for the benefit and welfare of the public in the Territory belonging to the United States. The Atlantic and Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent of benefits conferred upon one by the other, and it is not, we conceive, legitimate in arriving at the rights of the Territory in the premises to consider it as though it had created a factor and was exacting tribute for its favor. The United States presents no problem, asserts no claim, having, by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Were the controversy between the Government and the company the grant should, in the language of the Supreme Court, 150 U. S., p. 14, receive a liberal construction in favor
152 of the purposes for which it was enacted, and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the Territory to settle their respective rights. The company derives its rights from Congress, and they should be ascertained and determined by rules that will evolve the intention of Congress, and not by principles in the interest of a local government.

In Winona & St. Peter Railroad *vs.* Barney, 113 U. S., 618, 625, Mr. Justice Field, speaking for the court, says: The acts making grants are to receive such a construction as will carry out the intention of Congress, however difficult it may be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as the purposes declared on their face, and read all parts of them together.

Mr. Justice Jackson, in U. S. *vs.* Denver & Rio Grande
153 Railway Co., 150 U. S., p. 14, in quoting the above rule as announced by Mr. Justice Field, says:

"Looking to the condition of the country and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act operating as a general law and manifesting clearly an intention of Congress to secure public advantages or to subserve the public interest and welfare by means of benefits more or less valuable offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through the immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant and should receive at the hands of the court a more liberal construction in favor of the purpose for which it was enacted."

In Northern Pacific Railroad Company *vs.* Carland, 3 Pac. Rep., 144, the court, says Chief Justice Wade, after citing certain authorities, concludes:

154 "It follows from these propositions that the road-bed, the rails fastened to it, station buildings, workshops, depots, machine shops, etc., constructed over, upon, or through the right of way granted to the plaintiffs and attached to the soil and annexed to the easement, becomes a part of the real estate of the railroad company."

Again, quoting from the opinion in the case of Northern Pacific R. R. Co. *vs.* Carland, *supra:* "'It is a general rule that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object.' 'It is a well-known and reasonable rule, in construing a grant, that when anything is granted, all the means to attain it and all the fruits and effects of it are granted also.' Shaw, C. J., in Babcock *vs.* Western R. Corp., 9 Metc., 555. Here is a grant of a right of way through the public lands 'for the construction of a railroad and telegraph.'

155 Such a grant carries with it the right to the exclusive possession of the lands described for the purpose aforesaid; to make excavations, cuts, and fills in the soil or ground; to construct a road-bed of suitable width and grade; to lay ties and rails thereon, and to erect upon the lands described as and included in the right of way all buildings, shops, water stations, depots, etc., necessary and suitable to be used in constructing or operating such railroad.

This right necessarily implies property in the ground itself. This property is real estate and the title to it is a legislative grant. By virtue of this grant the railroad company acquired the same interest in the land as if it had received a deed of the land for the purpose of constructing and operating a railroad. The provision contained in section 2 of the act incorporating plaintiff declaring that 'the right of way shall be exempt from taxation within the Territories of the United States' therefore carries with it and exempts from taxation within the Territories the road-bed, the ties

156 and rails thereto attached, and all the station buildings, workshops, etc., necessary for the construction and for operating

said railroad, and the assessment for taxation and levy of tax thereon of 'twenty miles of railroad' in the county of Custer, as mentioned and described in the complaint, which description must include the road-bed, ties, and rails, and all necessary buildings attached to the soil and annexed to the easement of the right of way, was unauthorized and is illegal and void."

We deem the foregoing principles and authorities sufficient to exclude doubt as to the intention of Congress in granting the right of way and exempting it from taxation within the Territories of the United States.

And, further, it appears that the second section of the act incorporating the Atlantic and Pacific Railroad Company expressly includes in the right of way all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations. The second clause of said
157 section reads as follows: "Said way is granted to said railroad company to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations, and the right of way shall be exempt from taxation within the Territories of the United States."

It is plain that said clause must be construed with reference to its context, and that by such rule it seems "said way" is identical with the right of way referred to in the preceding clause, and that the exemption accorded by the succeeding clause includes and extends to the necessary grounds for station buildings, etc. The land being, in its virgin state, distinctly exempt, the road-bed being the land so converted, and the appurtenances, rails and ties, station buildings, workshops, depots, machine shops, necessary for the construction and operation of the railroad, becoming, by annexation, a part of the realty, it is inevitable that the aggregate
158 land, road-bed, rails and ties, and said appurtenances constituted the right of way contemplated by Congress. A less consideration could have been no inducement to the company to accept the franchise, and that it should now be deprived of this advantage distinctly conferred by the supreme authority creating it by a subordinate, dependent body, deriving its existence from the power that created both, would be unjust if not iniquitous. The Atlantic and Pacific corporation within the limits of the act creating it is as complete and independent as the Territory of New Mexico under its organic act.

Both are creatures emanating from the same source, and it cannot be that the latter can impair the rights of the former.

In conclusion it must be recognized that it is incumbent upon the court to be controlled by the manifest purpose of Congress in conferring the franchise upon the Atlantic and Pacific Railroad Company; and as it is palpable that the intention was to contribute substantial aid promotive of the construction of a railroad
159 by such company, we are constrained to the conclusion that the exemption accorded must be construed to include the fix-

tures essential to the establishment and operation of the road—the rails and ties are not more a part of the realty exempt than are the structures attached, as station-houses, etc.—and the one is not more indispensable to the completion of the road than are the others to its utilization for the accommodation of the Government.

We are therefore of the opinion that the right of way, including road-bed, ties and rails, station buildings, workshops, depots, machine shops, etc., is not liable to taxation in the county of Bernalillo, Territory of New Mexico, and the decree of the lower court is accordingly reversed.

THOMAS SMITH, *C. J.*

N. B. LAUGHLIN, *A. J.*

I concur in the conclusion reached by the court.

H. B. HAMILTON, *A. J.*

160 THE UNITED — TRUST CO.
vs.
ATLANTIC AND PACIFIC RAILROAD CO.

I cannot agree with my associates in the conclusion reached in this case.

The inquiry is not as to what has been granted, but is as to what has been exempted from taxation. The grant is the right of way, including necessary grounds for station-houses, shops, depots, etc. It is not material whether that grant conveyed the ownership of the soil or only an easement. It is not everything which the grantee erects thereon or affixed thereto which is exempt, but the thing exempt is the right of way. While it may be that this exemption is broad enough to extend beyond the mere ownership or use of the soil, and may cover such improvements as the road-bed, ties, rails, culverts, and bridges which are affixed to the right of way and necessary to the use of it as such—a proposition by no means clear—I am of the opinion that the exemption does
161 not cover other improvements not essential to the use of the right of way, however convenient and necessary such improvements may be to the orderly and economical conduct of the company's business; nor do I believe that such exemption extends to the additional grounds for station-houses, depots, workshops, etc., or to such improvements thereon. Portland R. R. *vs.* City Saco, 60 Me., 196; People *vs.* Tax Com., 82 N. Y., 459. If the exemption of a right of way can cover station-houses, workshops, and depots there is nothing to prevent a like exemption from extending to dwelling-houses for lodging employees or hotels for entertaining patrons, when erected on the right of way.

If the exemption extends so far, it must comprehend something more than the right of way and something by implication and liberal implication at that.

Some stress has been laid upon the point that the additional grounds for station-houses, shops, etc., are a part of the right of way; but, in my opinion, this is not well founded. The act does

not make the additional grounds a part of the right of way,
162 but the act grants the right, "including" all necessary ground for station-houses, etc. Grounds additional to the right of way are included in the grant, but when we look into the clause exempting from taxation we find it does not extend to all the property granted, but only and in terms to the "right of way." It has been settled by a long line of decisions from United States *vs.* Arrodondo, 8 Pet., 738, and the Charles River Bridge case, 14 Pet., 420, that grants from the sovereign are to be construed strictly against the grantee, who takes nothing by implication or which is not manifestly intended by the clear terms of the grant, and this rule applies as well in favor of third persons as it does in favor of the power making the grant. This rule is applied for a stronger reason and with greater strictness when the grant involves a surrender of one of the great powers essential to government, like that of taxation. U. S. *vs.* D., R. G. R. R., 150 U. S., 1. In a recent case the Supreme Court of the United States say; "The taxing power is
163 essential to the existence of government, and cannot be held to have been relinquished in any instance, unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention the conclusion is inevitable in favor of the reservation of the power."

Wilmington & W. R. R. Co. *vs.* Alsbrook, 146 U. S., 279: It does not matter whether the grant which is to operate as a relinquishment of the power of taxation is one made by a State legislature or by Congress, its terms are subject to the same rule of interpretation; and, unless Congress has exempted this property from taxation, the territorial legislature has the same power to tax it which it has to tax like property of other owners. Reading the act creating this exemption in the light of established judicial decisions, I am of the opinion that the exemption does not
164 extend to the additional grounds for station-houses, depots, shops, etc., nor to improvements thereon, nor to telegraph lines and poles on such right of way.

GIDEON D. BANTZ,
Associate Justice.

165 TERRITORY OF NEW MEXICO, } ss:
Supreme Court, }

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true, full, and perfect transcript of the record, assignment of errors, and all proceedings had in a certain cause lately pending in said court, wherein The United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, were appellants and The Territory of New Mexico was appellee, together with the opinion of the judges of said supreme court in said cause, which is annexed to and transmitted with said record,

in accordance with the rules of the Supreme Court of the United States, as the same remains on file and of record in my office.

Witness my hand and the seal of said supreme court this 7th day of April, A. D. 1897.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

Endorsed on cover: Case No. 16,578. New Mexico Territory supreme court. Term No., 368. The Territory of New Mexico, appellant, *vs.* The United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic & Pacific Railroad Company. Filed May 1st, 1897.

In the Supreme Court of the United States, at the October Term, 1897.

TERRITORY OF NEW MEXICO, Appellant,
vs.
THE UNION TRUST COMPANY *et al.* } No. 368.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that the statement of facts certified by the supreme court of the Territory of New Mexico, and to be attached hereto, may be taken and considered as a part of the record in said cause the same as though it had been originally sent up with the transcript of record therein.

F. W. CLANCY,
Solicitor for Appellant.

C. N. STERRY,
Solicitor for Appellee.

Be it remembered that at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the twenty-sixth day of July, A. D. 1897, and on the thirty-seventh day of said term of said supreme court, the same being Wednesday, the 12th day of January, A. D. 1898, the following, among other, proceedings were had, to wit:

In the Supreme Court of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK
vs.
ATLANTIC & PACIFIC RAILROAD COMPANY *et al.* } No. 670.

In the matter of the intervening petition of the Territory of New Mexico, appellee.

The appellee having applied to this court for a statement of facts in this case in accordance with the provisions of the act of Congress entitled "An act concerning the practice in territorial courts and appeals therefrom," which became a law on the 7th of April, 1874, to be transmitted to the Supreme Court of the United States, the court hereby certifies that this case was tried in the court below upon an agreed statement of facts; which agreed statement of facts was made part of the record upon appeal to this court and is a part of the record on appeal to the Supreme Court of the United States, and that the said agreed statement sets out the facts of this case

and is hereby adopted by this court as its statement of such facts without here repeating the same.

THOMAS SMITH,
Chief Justice of the Supreme Court of New Mexico,
who Signed this Certificate on Behalf of the Court.

TERRITORY OF NEW MEXICO, }
In the Supreme Court. }

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true and correct copy of a certificate made by said court and signed by the chief justice thereof in open court in a cause lately pending in said court entitled The United States Trust Company of New York *vs.* Atlantic and Pacific Railroad Company *et al.*, in the matter of the intervening petition of the Territory of New Mexico, appellee, now on appeal to the Supreme Court of the United States, as the same appears on file and of record in my office.

Seal Supreme Court, Territory of New Mexico.

Witness my hand and the seal of said supreme court of the Territory of New Mexico this 13th day of January, A. D. 1898.

GEO. L. WYLLYS, *Clerk.*

[Endorsed:] Case No. 16,578. Supreme Court U. S., October term, 1897. Term No., 368. The Territory of New Mexico, app't, *vs.* The United States Trust Co. of New York *et al.* Stipulation and addition to record. Office Supreme Court U. S. Filed Feb. 14, 1898. James H. McKenney, clerk.

No. 368, 458 & 459.

Motion papers.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 24, 1898.

THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 368.
THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 458.
THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 459.

Now comes the Territory of New Mexico, appellant, in the three above-entitled causes, and moves the Court to

consolidate the said three cases for argument in this Court and to set them down for argument as a single case, and permit the filing of one set of briefs for use in all three of said cases, for the reason, as will appear by inspection of the records, that the principal question involved in each of said cases is identical, and such differences as there may be are of a minor character which can be readily elucidated and presented in a single brief and argument on each side.

F. W. CLANCY,
Solicitor for Appellant.

I unite in foregoing motion.

E. D. KENNA,
Solicitor for Appellees.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 368.
THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 458.
THE TERRITORY OF NEW MEXICO, APPELLANT, v. THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.	No. 459.

MOTION TO ADVANCE.

Now comes the Territory of New Mexico, appellant in each of the three above-entitled causes, and moves the

Court to advance said cases for argument on the earliest practicable day at the present term of the Court, for the following reasons:

1. The said cases involve matters of general public interest in that they are prosecuted for the purpose of establishing the right of the said appellant to recover large amounts of money claimed to be due for taxes levied upon the property of the Atlantic and Pacific Railroad Company as to which an exemption is claimed by virtue of the provisions of the act of Congress approved July 27, 1866, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast."

2. The amount of such taxes with the interest thereon as provided for by the statutes of New Mexico, computed upon the most favorable basis to the appellees, will amount to nearly, if not quite, the sum of $200,000 by the time a decision can be reached in this Court, even if the cases be advanced, and the financial condition of the said Territory of New Mexico is such as to make it highly important to have such decision at the earliest possible day.

3. The rate of interest upon delinquent taxes as fixed by the statutes of New Mexico is twenty-five per centum per annum, and if the appellees are required ultimately to pay the said taxes, it is only fair and just to them that the fact should be ascertained as soon as possible so as to stop the running of such a high rate of interest.

F. W. CLANCY,
Solicitor for Appellant.

I unite in foregoing motion.

E. D. KENNA,
Solicitor for Appellees.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 106.
The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 169.
The Territory of New Mexico, Appellant, vs. The United States Trust Company of New York, et al.	No. 170.

STATEMENT OF CASE.

These three cases have been consolidated for argument for the reason that the principal question involved in each case is the same, and appellant submits but one brief to cover its appeals in all of the cases.

The first of these cases was begun by the filing in the district court for Bernalillo county, in the Territory of New Mexico, by the district attorney for the territory, of an intervening petition on behalf of the territory praying for an order against the receiver of the Atlantic and Pacific Railroad Company, requiring him to pay the amount of taxes claimed to be due upon the improvements on the right of way of said railroad company in the county of Bernalillo, and upon station

houses and other improvements at seven different stations in said county. The taxes claimed were for the years 1893, 1894 and 1895.

The receiver above referred to had been appointed at the instance of the United States Trust Company of New York in a suit brought to enforce the lien of a mortgage made to secure the first mortgage bonds of the railroad company.

It was contended on behalf of the receiver that the property sought to be taxed was exempt from taxation by virtue of section two of "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast", which became a law July 27, 1866. So much of said section as is material to this controversy, is as follows:

> And be it further enacted that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water-stations; and the right of way shall be exempt from taxation within the territories of the United States.
>
> *14 Statutes at Large, 292.*

The argument in favor of this claimed exemption was that the donation of the right of way was such as to vest in the railroad company a title in absolute fee simple to land one hundred feet in width on each side of said railroad where it might pass through the pub-

lic domain; that all of the improvements sought to be taxed were affixed to and had become a part of the realty; that the land being exempt from taxation by the act of Congress, all improvements which were affixed thereto were also exempt from taxation as apart thereof.

The Territory contended that the right of way donated was only an easement and that alone was exempt from taxation, in accordance with the general rule that all exemptions from taxation are to be strictly construed; that even if the railroad company owned the land, over which it had a right of way, in absolute title, yet the exemption was of the land only, and for purposes of taxation the improvements thereon were separable from the land and properly subject to tax; and that, if there were merely a doubt as to the exemption extending to the property sought to be taxed, the existence of that doubt was fatal to the claim of exemption.

The district court held with the territory, the opinion of the judge of that court being found at page 55 of the printed record. Upon appeal to the supreme court of the territory that court reversed the decree of the court below and dismissed the intervening petition of the territory. From that decision the territory has appealed to this court.

After the decision of the supreme court of the territory, the second of these cases was begun by a like intervening petition filed in the same district court for the purpose of obtaining the payment of taxes on similar property in the county of Valencia for the years 1892 to 1896, both inclusive. The district court upon a hearing as to sufficiency of pleas to that intervening petition, declined to pass upon that question and dismissed the intervening petition because it fell within the decision of the supreme court of New Mexico theretofore rendered in the first of these

cases. Upon appeal to the supreme court of the territory this decree was affirmed and an appeal was then taken to this court.

In this case it appears that in Valencia county the railroad line runs over what was public domain of the United States when the right of way was granted, for a distance of 33 miles, and over land which was held in private ownership at the time of said grant, for a distance of 60.7 miles.

Record in No. 169, pp. 80-1.

The third of these cases was begun in like manner for the purpose of setting up the claim of the territory for taxes in Bernalillo county for the year 1896 upon the same kind of property, and the same proceedings were had in this case as in the second one.

While the defenses made in the district court raised a number of minor points as to mode of assessment and other like matters, yet it is obvious that the main question for consideration, and, indeed, the only one passed upon by the supreme court of New Mexico, is as to the effect of the exemption contained in that part of section two of the act of Congress already hereinbefore quoted. To that question alone will attention be given in this brief.

The appellant has made, in the several cases, the following

ASSIGNMENTS OF ERRORS:

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 106.

Now comes the said appellant by its solicitor and says to the court here that there is manifest error in the record and decree in this cause, and specifies for error the following:

1. The supreme court of New Mexico erred in reversing the decree of the district court of Bernalillo county.

2. The supreme court of New Mexico erred in denying and dismissing the intervening petition of appellant.

3. The supreme court of New Mexico erred in finding that there had been any assessment for taxes of the right of way and necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations in the county of Bernalillo, territory of New Mexico.

4. The supreme court of New Mexico erred in finding that the taxes and penalties levied on the improvements placed on the right of way and other grounds of the Atlantic & Pacific Railroad Company were unlawfully and illegally levied.

Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 169.

Now comes the said appellant by its solicitor and says to the court here that there is manifest error in the record and decree in this cause and specifies as such error in the said decree that the supreme court of New Mexico erred in dismissing the intervening petition of the appellant.

Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

The Territory of New Mexico,
Appellant,
vs.
The United States Trust Company of New York, et al.
No. 170.

Now comes the said appellant by its solicitor and says to the court here that there is manifest error in the record and decree in this cause and specifies as such error in the said decree that the supreme court of New Mexico erred in dismissing the intervening petition of the appellant.

Wherefore appellant prays that the decree of the supreme court of New Mexico may be reversed and set aside and this cause remanded for such further proceedings as to this court shall seem proper.

F. W. CLANCY,
Solicitor for Appellant.

POINTS AND AUTHORITIES.

I.

A right of way is a mere easement, and the grant of a right of way does not carry the fee to the land.

When words and phrases which have acquired well-known, technical meanings in the law, are used in a statute, the rule of construction is that no other or different meaning shall be given to them.

Cooley's Const. Lim., 60.

Sutherland on Statutory Construction Sec. 247, 346.

Reference to any standard law dictionary will show that a right of way is a mere easement, and that a conveyance of a right of way cannot be held as conveying the fee in the land.

> "Right of way" in its strict meaning, is "the right of passage over another man's ground;" and its legal and generally accepted meaning, in reference to a railway, is a mere easement in the lands of others, obtained by lawful condemnation to public use or by purchase, (*Mills on Em. Dom., Sec. 110.*) It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way.

Williams vs. Western Union Railway Co., 50 Wis., 76.

Ottumwa R. R. Co., vs. McWilliams, 71 Iowa 164.

Kellogg vs. Malin, 50 Mo., 499-500.

Atlantic & Pacific R. R. Co., vs. Lesueur, 19 Pac. 157.

Lyon vs. McDonald, 78 Texas, 71.

Lumby vs. Vermont Cent. R. R. Co., 24 Vt. 387.

Chicago & Southwestern R. R. Co., vs. Swivney, 38 Iowa 182.

Probably the only authority to be found any where

which even appears to militate against this position, is the case of the *Railway Co. vs. Roberts, 152 U. S., 114.* In that case, at page 122, referring to the grant of a right of way similar to the one under consideration in the present case, the court said:

> No such right was relinquished until after the grant of the right of way, under the act of Congress of July 26, 1866, to the Missouri, Kansas & Texas Railway, and the title of the lands composing the right of way had become vested in that company.

It was urged below on behalf of appellees that this is an adjudication that the absolute fee in the land passed to the railway company by the act of congress. An examination of this case will show that this point was not involved, that the court refers to the vesting of the title in a cursory way, and that the construction sought to be placed upon the language of the court by appellees is a strained one. The comment of Judge Ross upon this language is so pertinent that we quote it as follows:

> No point appears to have been made in the case as to whether the right of way there granted to the railway company was but an easement, or carried the fee, nor was such point necessarily involved, since the grant of the right of way for the construction of the railroad, whatever its nature, necessarily carried the right of possession thereto, as against any inconsistent use thereof. I do not think, therefore, that the case of *Railway Co vs. Roberts* should be held to be an adjudication by the supreme court that a grant of the right of way over the public domain is not the grant of an easement therein, but necessarily carried the fee thereof, or that the court so intended it, especially where, as in the case at bar, the act of Congress grants to the railroad company various sections of the public lands, for which it is provided patents shall be issued by the officers of the government, and also grants the right of way over lands of the government, for which no provision is made for the issuance of any evidence of title. Of course this distinction in the grant between

the lands granted in aid of the construction of the road, and the right of way therefor, is not conclusive, for the fee of land may be granted by direct act of Congress. But, in my opinion, it strongly indicates that Congress did not intend that the grant of the right of way of the Atlantic & Pacific Railroad Company should cover the fee of the lands included only within the right of way, but only such an easement therein as, under the settled rules of law, is usually covered by such grants. *Williams vs. Railway Co. (Wis.) 5 N. W. 482; Lumber Co. vs. Harris (Tex. Sup.) 13 S. W. 453; St. Onge vs. Day (Colo. Sup.) 18 Pac. 278; Railroad Co. vs. Lesueur (Ariz.) 19 Pac., 157; Mills Em. Dom., Sec. 110.*

Mercantile Trust Co. vs. A. & P. R. R. Co., 63 Fed. 913.

It is perfectly clear that Congress when it passed the act of 1866, creating the Atlantic & Pacific Railroad Company, proceeded upon the assumption that the territories which it had created, including New Mexico, would have the power to tax the company upon its property, and even upon a mere easement or right of passage through the territory, because it found it necessary to insert in that act a special provision that "the right of way shall be exempt from taxation within the territories of the United States."

II.

The exemption of the right of way from taxation does not exempt the improvements thereon.

In other words, reversing the proposition, improvements affixed to the land by the owner of the right of way, do not become a part of the mere easement, but are property—real estate—of that owner, distinct and separable from the mere right of way for purposes of taxation.

The argument of appellees is, that the property, the taxation of which is in question in the present case, is so affixed to the land over which the railroad company

has its right of way, as to become a part of the realty, and whether the grant of the right of way is to be taken as an absolute grant of the land itself, or as conveying only an easement, this property cannot be assessed for purposes of taxation separately from the land itself, but has so become a part of it that it can be taxed only if the land itself be taxable. It is not claimed on the part of the territory that the land can be taxed, or that the easement of the railroad company can be taxed; nor is it claimed that the property in question can be taxed as personal property. It is claimed, however, that, although it must be classed as real estate under our statute, being covered by the statutory definition of "improvements," yet there is nothing in its nature which prevents it from being assessed like any other property. In the first place, our statute clearly contemplates the possibility of improvements being assessed and taxed separately from the land to which they are affixed, as will be seen by reference to section 4019 of the compiled laws of 1897, where we find the following language;

> The terms mentioned in this section are employed throughout this chapter in the sense herein defined:
>
> First. The term "real estate" includes all lands within the territory, to which title or right to title has been acquired; all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto, and improvements.
>
> Second. The term "improvements" includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

In the absence of such a statute as this there might be more force to the contention that such improvements could not be assessed separately from the ownership of the land, but our statute clearly provides for such a contingency. Our position on this

matter need not rest, however, entirely upon construction of the statute, but is amply supported by adjudicated cases.

The property assessed in this case is the track of the relators consisting of its stringers, ties and rails. This track is laid down in the public highway, and the relators have or claim no interest in the land of the highway, save a right to use the same for the passage of their teams and vehicles to and fro over this track. This right they claim, and doubtless have, and it includes a right to the constant and exclusive, and for the extent of their chartered existence, the lasting use of the soil, for the support of their track. It is an easement. (*Williams vs. New York Central Railroad Co., 16 N. Y. 97-109; Craig vs. R. & B. R. R. Co., 39 N. Y., 404.*) And this is an interest in the land over which it is enjoyed. (*Washburn on Easements, 6.*) It gives them the right of the exclusive possession as from time to time they shall need to use any part of it.

By the statutes in relation to easements and taxation (*1 R. S., 360, Sections 1, 2,*) "all lands * * * within this state, whether owned by individuals or corporations, shall be liable to taxation * * *" "The term 'land' * * * shall be construed to include the land itself, and all buildings, and all other articles erected on or affixed to the same * * * and the terms 'real estate' and 'real property' * * * shall be construed as having the same meaning as the term 'land' thus defined."

By force of these provisions, the track of the relators, consisting of stringers, ties and rails, affixed to the land, is, for the purpose of assessment and taxation, land, real estate, real property. And is liable to taxation. To some name, or in some way it should be assessed. This does not seem to be seriously disputed by the relators. But they suggest that if the assessors did their duty, which is always to be presumed, then they assessed to the owners of the fee in the land, over which the highway run, the land to the center of the highway, and must be presumed to have assessed to them, the land at a valuation affected and increased by the value of the fixtures, which make the track of the relators. We do not think

that such a presumption can be entertained. The facts in the case are too potent and well known to permit the presumption, that the track was considered as belonging to the owner of the fee, which is little more than a reversion, contingent if at any time in the future the different rights of way over the land shall cease.

We are not inclined to give to the terms of the statute a construction so narrow as that required by the position of the relators. That would be to hold that buildings and fixtures are not included in the term "land," except as inseparable, in the consideration of the ownership thereof, from the ownership of the fee; and that no right or interest in the land less than the fee thereof would, for the purpose of assessment, be deemed to fall within the meaning of "land," as set forth in the statute. The statute means, for its purpose, to make two general divisions of property; one all lands, another all personal estates; and then to be more definite, it declares, that by land is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not in the view of the statute, land, unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion that the statute means that such an interest in real estate, as will protect the erection, or affixing thereon, and the possession of buildings and fixtures, will bring those buildings and fixtures within the term "lands," and hold them to assessment as the lands of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures.

The defendants were right then, in considering the right of the relators as land, and liable to assessment as such. (See *The People vs. Beardsley, 52 Barb., 105*, since (September, 1869,) affirmed in this court.)

People vs. Casity, 46 N. Y., 48-50.

People vs. Commissioners, 82 N. Y. 462-3.

This is a tax suit, the defendant claiming that no taxes on the property can be recovered of him. The city and county of San Francisco, in 1875,

under the act of March 30th, 1875, leased to defendant a portion of the school lot belonging to the city and county, located at the corner of Market and Fifth streets. The defendant took possession of the leased land and made improvements and erected a substantial four story frame building, with brick foundation, attached to the soil. For the fiscal year 1881-2 the building and improvements were assessed to defendant, and this suit is to recover the taxes. The defendant insists that he is not liable for the taxes, because, he says, first, the city and county own the realty, the improvements and building are portions of the realty, and therefore not his property; and second, section 3887 of the Political Code, as in force at the date of the lease, declared that the "lessor of real estate is liable for the taxes thereon," and the city and county, being liable, cannot recover of him.

It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, for the purpose of revenue, the legislature of this state has observed a distinction between real estate and improvements, and that distinction has been recognized by this court.

Section 3607 of the Political Code, as in force in 1875, declared that property of municipal corporations was not subject to taxation. If, as contended, the building and improvements were portion of the realty and thus exempt, the provisions of the constitution of 1863, as to uniformity of taxation, might be evaded.

We are of the opinion that, for the purpose of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes.

San Francisco vs. McGinn, 67 Cal. 110.

People vs. Shearer, 30 Cal. 656.

Crocker vs. Donovan, 30 Pac. 377.

Turney vs. Saunders, 4 Scam. 527.

Waller vs. Hughes, 11 Pac. 122.

Gold Hill vs. Caledonia Co., 5 Sawyer, 575.

A. & P. R. Co. vs. Lesueur, 19 Pac., 159.

For the purpose of taxation each (land and buildings erected thereon) is separate and dis-

tinct from the other. The exemption of the land from taxation does not imply the exemption of the buildings erected thereon, any more than the exemption of the building implies the exemption of the land. As respects taxation the two descriptions of property are as separate and distinguishable as real estate is from personal property. The statute means what it says and no more; if the legislature intended to give it a broader meaning than is expressed it would have said so. The court will not enlarge the meaning of the statute by implication in order to give it an effect contrary to common right.

Portland, etc., R. R. Co. vs. Saco, 60 Me. 196.

III.

Exemption from Taxation is the Exception, and all such Exemptions are to be Strictly Construed.

It ought not to be necessary to cite authorities in support of this proposition, but because of the attempt to extend by implication the exemption given by congress to something far beyond its terms, on account of the alleged congressional purposes in creating the railroad company, and by the suggestion that, in order to be of great value the exemption must certainly include more than is indicated by the language used, attention will be called to a few cases as illustrative of the strictness with which this rule is held and enforced by the courts.

In the leading case of *Providence Bank vs. Billings, 4 Pet. 514, Chief Justice* Marshall, speaking of a partial release of the power of taxation by a state in a charter to a corporation, said: "That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear." "We must look for the exemption in the language

of the instrument; and if we do not find it there, it would be going very far to insert it by construction." *(4 Pet. 561-563.)*

In Philadelphia & Wilmington Railroad vs. Maryland, 10 How. 376, Chief Justice Taney said: "This court on several occasions has held that the taxing power of a state is never presumed to be relinquished unless the intention to relinquish is declared in clear and unambiguous terms." *(10 How. 393.)*

In the subsequent decisions, the same rule has been strictly upheld and constantly reaffirmed in every variety of expression. It has been said that "neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender is expressed in terms too plain to be mistaken"; that exemption from taxation "should never be assumed unless the language used is too clear to admit of doubt"; that "nothing can be taken against the state by presumption or inference; the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power; if a doubt arises as to the intent of the legislature, that doubt must be solved in favor of the state;" that a state "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require;" and that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris.*" *Jefferson Branch Bank vs. Skelly, 1 Black 436, 446; Gilman vs. Sheboygan, 2 Black, 510, 513; Delaware Railroad Tax, 18 Wall., 206, 225, 226; Hoge vs. Railroad Co., 99 U. S. 348, 355; Southwestern Railroad vs. Wright, 116 U. S. 231, 236; Erie Railway vs. Pennsyvania, 21 Wall., 492, 499; Memphis Gaslight Co. vs. Shelby Taxing District, 109 U. S. 398, 401; Tucker vs. Ferguson, 22 Wall., 527, 575; West Wisconsin Railway vs. Supervisors, 93 U. S. 597; Memphis & Little Rock Railroad vs. Railroad Commissioners, 122 U. S. 609, 617, 618.*

Railroad Co. vs. Dennis, 116 U. S. 667-8-9.
Banks vs. Tennessee, 104 U. S. 496-7.
Railroad Co. vs. Thomas, 132 U. S. 185.
Schurz vs. Cook, 148 U. S. 409.
Railroad Co. vs. Alsbrook, 146 U. S. 294.
Railroad Co. vs. Guffey, 120 U. S. 574-5.
Land Co. vs. Minnesota, 159 U. S. 529.
A. & P. R. Co. vs. Lesueur, 19 Pac. 159.

IV.

The Territorial Legislature possesses all the power of Congress in Legislating for the Territories, subject only to the express limitations imposed by Congress itself.

At the first glance it may be difficult to see what this proposition has to do with these cases, or why it is necessary to present argument in its support, established as it is by former decisions for this court. By reference, however, to the opinion of the supreme court of New Mexico, which appears in the record of case No. 106, beginning at page 69—and we are here to show the unsoundness of that opinion—it will be seen that the conclusions reached are based upon two positions, the first being that territorial governments are of such inferior character that their legislation is entitled to but little weight; and the other that a liberal rule of construction must be applied to the exemption of the right of way from taxation, instead of the usual construction applied by courts to such exemptions. The second position to some extent depends upon the establishment of the first.

That court in that opinion holds, in substance, that the territorial governments have but limited and special powers, specifically enumerated by congress, while appellant's position is that those governments have, as has been declared by this court, very broad

and ample powers, but little, if any, inferior to those possessed by the states.

In order to avoid any misunderstanding of this contention, quotation is made from the opinion of the court below of that which appears most strongly and clearly to state the proposition upon which the case is made to turn, as follows:

> It is true that exemption from taxation by a state is construed with strictness in favor of a state, but it will be observed that this discrimination exists where the exemption is the action of a state as to property within its jurisdiction, not a privilege derived from the general government for the benefit and welfare of the public in a territory belonging to the United States. The Atlantic and Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent of benefits conferred upon one by the other. It is not, we conceive, legitimate in arriving at the rights of the territory in the premises, to consider it as though it had created a factor and was exacting a tribute for its favor. The United States presents no problem, asserts no claim, having by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Without a controversy between the government and the company, the grant should, in the language of the supreme court, *150 U. S., page 14*, receive a liberal construction in favor of the purpose for which it was enacted, and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the territory to settle their respective rights. The company derives its rights from Congress, and they should be ascertained and determined by rules that will evolve the intention of Congress and not to oppress in the interest of a local government.

It will be seen that the court holds in effect that if this controversy were between the United States and the railroad company—if this were a question arising as to legislation by Congress imposing a tax—a differ

ent rule of construction would be applied to the exemption question from that which is proper in considering legislation of the territory.

I desire to reiterate that acts of the territorial legislatures are to be considered by the courts, so long as they are not inconsistent with the laws and constitution of the United States, as of the same importance and dignity as laws enacted by Congress itself for the government of the territories, and that they are not hedged about, hampered or obstructed as are the acts of Congress itself when that body is legislating for the country at large in the exercise of its limited and delegated powers.

The constitution of the United States confers upon Congress certain enumerated and specific powers, and it is conceded by the advocates of even the most liberal rule of constitutional construction, that the federal Congress can exercise no other powers than those which are expressly set forth in the constitution, or are necessarily implied; but this part of the constitution and this doctrine applies to the powers of Congress delegated by the states and to be exercised in and for the states. When we come to the consideration of the power of Congress to legislate for the territories, as set forth in the constitution, or as established by a long course of congressional and judicial construction, we find that that power is absolute, complete and unlimited (except by the constitutional provisions as to rights of persons and property) as would be the power of a state legislature if unhampered by a state constitution. This power, in almost its entirety, has been delegated by Congress to the territorial legislatures. Nothing can be found in adjudicated cases inconsistent with this view, and every expression of this court is in harmony with it, and it is clearly recognized in at least one territorial case, from which quotation will be hereafter made.

At the outset of the consideration of authorities on this subject it is essential to call attention to the language of this court in what is undoubtedly the leading case as to the character of territorial governments:

> Whenever Congress has proceeded to organize a government for any of the territories, it has merely instituted a general system of courts therefor, and has committed to the territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the defining of the jurisdiction of the several courts. As a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject also, however, to the right of Congress to revise, alter and revoke at its discretion. The powers thus exercised by the territorial legislature are nearly as extensive as those exercised by any state legislature, and the jurisdiction of the territorial courts is collectively coextensive with and corresponding to that of the state courts—a very different jurisdiction from that exercised by the circuit and district courts of the United States. In fine, the territorial, like the state courts, are invested with plenary municipal jurisdiction.
>
> *Hornbuckle vs. Toombs, 18 Wall., 657.*

In another case this court has declared that the theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress. In the same case the court further says that "in all the territories full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all."

Clinton vs. Englebrecht, 13 Wallace, 441, 443-4.

> While this statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. By section six of the act of September 9th, 1850, (9 Stat. at L. 453,) establishing a territorial government for Utah, it is provided: "That the legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands of other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." With the exceptions noted in this section, the power of the territorial legislature was apparently plenary as that of a legislature of a state. *Maynard vs. Hill, 125 U. S. 204.* The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the territorial legislature to deal with as it saw fit, in the absence of an inhibition by Congress.

Cope vs. Cope, 137 U. S., 684.

The case last cited is also interesting and instructive because it proceeds elaborately to consider the effect of congressional enactments under which an annulment of territorial statutes by implication was claimed, in precisely the same way as would be considered the question of a repeal by implication of an act of the Congress itself, thus clearly putting territorial legislation on the same level as legislation by Congress.

In the territory of Utah a case arose involving the validity of an act of the legislature of the territory of Idaho by which the bonds of matrimony between Ly-

man P. Higbee and his wife were declared dissolved, and the supreme court of Utah, in a very elaborate opinion, held that such an act was beyond the power of a territorial legislature.

In re Higbee, 5 Pac. 694 et seq

Attention is called to this Utah case for the sake of emphasizing an opinion of this court, which is directly opposite to that of the territorial court. In the opinion of this court, at some length, but with great clearness, the almost unlimited power of territorial legislatures is upheld, and language is used indicating at least an unwillingness positively to declare that the prohibition of the federal constitution against the impairment of contracts applies to legislation by territorial legislatures,—an unwillingness only consistent with the position which we take that the territorial legislatures are really Congress in another form.

Maynard vs. Hill, 125 U. S. 203, 210.

In more recent cases in this court, like views of the extent of the legislative power of territorial governments are expressed.

Thomas vs. Gay, 169 U. S. 271-2-3.

McHenry vs. Alford, 168 U. S. 664, 669.

> The only question presented in the court below or in this court, is the effect as to the plaintiff in error of said section 118, Rev. St. Wyo. It is urged that this section is in its nature and effect a bankrupt or insolvent law, and that the legislature of the Territory of Wyoming had no power to pass a bankrupt or insolvent law. Without discussing the question as to how far this section 118 partakes of the nature of a bankrupt or insolvent law, and waiving the question as to what the effect would be upon the other portions of the assignment law if this section should be found invalid, we will consider the power or authority of the legislature to pass such a law. The argument of the plaintiff in error, stated briefly, is that the authority of the legislature of Wyoming territory was derived from Congress, that Congress could

confer no greater power than it had itself; and that Congress had no power or authority to pass a bankrupt or insolvent law for Wyoming territory. This argument rests upon the assumption, which is made as the basis of the argument, that the power of Congress upon this subject is derived from and limited by sub-division four of section eight of article one of the constitution of the United States, conferring upon Congress power to establish "uniform laws on the subject of bankruptcies throughout the United States." As to this contention it is sufficient to say that the power of Congress to legislate for the territories is not derived from nor limited by this nor any other express provision or provisions of the constitution. As to the extent of this power the supreme court of the United States says: "All territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by or under the authority of Congress. Congress may not only abrogate laws of the territorial legislature, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territory and all departments of the territorial government. It may do for the territories what the people, under the constitution of the United States, may do for the state." *National Bank vs. County of Yankton, 101 U. S. 129.* It is thus apparent that the doctrine that the general government is one of limited powers granted by the states, and enumerated in the express provisions of the constitution, or derived by necessary implication from such enumerated powers, however just and salutary, as applied to the states, has no application to the territories of the United States. The power of Congress to legislate for the territories, is not to be compared to nor measured by its powers to legislate for the people of the states. It is not a power which was granted to the general government in the adoption of the constitution by the states. It is not one which was withheld by them. It is one which they never possessed, either to grant or withhold. It is one of the essential and most important attributes of sovereignty; a sovereignty

which no state ever possessed or claimed or attempted to exercise outside of its own boundaries. The source of this plenary power of legislation for the territories our courts have seldom, if ever, attempted to define. As to its existence, there is at this day no question. "Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular state, and is within the powers and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source from whence the power is derived, the possession of it is unquestioned. In legislating for them (the territories) Congress exercises the combined power of the general and of a state government." *Insurance Co. vs. Canter, 1 Pet. 541.* This language was commented upon and explained in the case of *Dred Scott vs. Sanford,* but not so as to interfere with its application to cases such as the one at bar. "The distinction between federal and state jurisdiction under the constitution of the United States has no foundation in these territorial governments; and consequently no such distinction exists, either in respect to the jurisdiction of the courts or the subjects submitted to their cognizance. They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both federal and state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction." *Benner vs. Porter, 9 How. 242.*

Downes vs. Parshall, 26 Pac. 995.

Ty vs. Guyot, 22 Pac. 134.

A. & P. R. R. Co. vs. Lesueur, 19 Pac. 160.

V.

Nothing but a strict rule of construction can be properly applicable to the exemption of the right of way from taxation.

As has been already shown, the court below in great part, at least, put its denial of this proposition upon the ground that this controversy is not one between the railroad company and the power which granted the exemption, and we have endeavored to show that, so far as it rests upon this basis, that court is in error. The reasoning adopted by the court, based upon what was, or ought to have been, the intent of Congress, in view of the conditions existing at the time of the passage of the act in 1866, and of the difficulties in the way of constructing the proposed railroad, is of precisely the same character as that which was urged upon this court in at least two similar cases, but without avail.

> It is argued in support of this writ of error that, as the exemption from taxation of the capital stock was unqualified and perpetual and began at the moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to ten years after the completion of the railroad; and that the legislature, while exempting the railroad from taxation for ten years after its completion, *could not have intended to subject it to taxation before its completion and while its earnings were little or nothing.*
>
> On the other hand, it is argued that the consideration of the exemption from taxation, as of all franchises and privileges granted by the state to the corporation, was the undertaking of the corporation to prosecute to completion, within a reasonable time, the work of building the whole railroad from the Mississippi to the Texas line; that one reason for defining the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said railroad"

without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the state had never allowed a similar exemption to take place, except after a railroad had been entirely finished; and this argument is supported by the opinions of the supreme court of Louisiana in *State vs. Morgan, 28 La. Ann., 482, 491*, and in the case at bar, *34 La. Ann., 954, 958.*

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite and unambiguous.

In their natural and legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years after its completion. If the legislature had intended to limit the end only and not the beginning of the exemption, its purposes could have been easily expressed by saying "until" instead of "for," so as to read "until ten years after the completion," leaving the exemption to begin immediately upon the granting of the charter.

To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to *insert by construction* what is not found in the language of the contract; to presume an intention which the legislature has not manifested in clear and unmistakable terms; to surrender the taxing power, and to go against the uniform current of decisions of this court upon the subject, as shown by the case above referred to.

Railroad Co. vs. Dennis, 116 U. S., 669-70.

By the eighth section of the company's charter it was declared "that said company, its stock, its railroads and appurtenances, and all its property in this state necessary or incident to the full exercise of all the powers herein granted, not to include compresses or oil mills, shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired, the property of said railroad may be taxed at the same rate as other property in this state." If the provision had terminated with the words "Mississippi river," it would not be open to argument in this court that the exemption claimed did not commence until the river was reached.

In *Vicksburg, S. & P. R. Co. vs. Dennis, 116 U. S., 665*, it was held that a provision in a railroad charter by which "the capital stock of said company shall be exempt from taxation, and its road, fixtures, work-shops, warehouses, vehicles of transportation and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this state," did not exempt the road, fixtures and appurtenances from taxation before such completion. It was argued, as it is here, that the legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion, and when its earnings were little or nothing; on the other hand, it was argued there, as it is here, that one reason for defining the exemption of the road and its appurtenances from taxation, as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation by postponing or omitting the completion of a portion of the road; but this court said, speaking through Mr. Justice Gray: "Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision where the

words of the statute creating the exemption are plain, definite and unambiguous." It appeared there, as it does here, that the taxing officers of the state had omitted in previous years to assess the property, but it was held that such omission could not "control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." And the court took occasion to reiterate the well settled rule that exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*.

Tested by that rule, did the addition of the words "but not to extend beyond twenty-five years from the date of the approval of this act," operate to create an exemption of twenty-five years from the date of the act, subject to being reduced to less than that if the road were completed to the river before the lapse of five years, but for twenty years at all events; or did it operate to reduce the term of the twenty years exemption by so much as the completion of the road to the river took over five years. Upon the one view there would be a loss of the exemption through the rapidity of construction; in the other view, a gain, or rather, the prevention of a loss. Does it appear by clear and unambiguous language that the state intended to surrender the right of taxation for twenty-five years? If the surrender admits of a reasonable construction consistent with the reservation of the power for a portion of the longer period, then for that portion it cannot be held to have been surrendered. Is not the construction that the exemption was to be for a term of twenty years, subject to a diminution of that term if the river were not reached in five years, as reasonable as the opposite construction; and if the latter construction be adopted, would it not be extending the exemption beyond what the language of the concession clearly requires? Can an exemption expressly limited to a term of twenty years after the accomplishment of a designated work, but not to extend beyond twenty-five years from a certain date, be read as an exemption for twenty-five years, but not to

extend beyond twenty years from the completion of that work? It seems to us, notwithstanding the ample and ingenious arguments of appellant's counsel, that these questions answer themselves, and that the exemption claimed cannot be sustained.

* * * * * *

Again, the preamble of the act is referred to by counsel as sustaining their construction, because it is therein declared that the work is one of "great public importance" and "to be encouraged by legislative sanction and liberality" and that "the physical difficulties of constructing and maintaining railroads to, across, along or within either the Mississippi, Sunflower, Deer Creek or Yazoo bottoms or basins, or the other alluvial lands herein referred to, are such that no private company has so far been able to establish a railroad and branches developing said basins and alluvial lands, and connecting them with the railroad system of the country." But, as the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up. Indeed, what is therein stated appears to us to be quite as referable to the remarkably extensive powers granted as to the assignment of reasons for exemption from taxation.

It is true that it is stated in section eight that, in order to encourage the investment of capital in the enterprise, and "to make certain in advance of such investment, and as inducement and consideration therefor, the taxes and burdens which the state will and will not impose thereon," the exemption is thereby declared. Yet if, notwithstanding that statement, the matter were left uncertain, that would not allow the court to make it certain by construction, and to *remove ambiguity upon the presumption of a legislative intent* contrary to the fixed presumption where the rights of the public are involved. In short, there can be no uncertainty in the result where the language used is construed, as it must be, in accordance with thoroughly settled principles.

R. R. Co. vs. Thomas, 132 U. S. 184-5-6, 188-9.

In the present case, in order to sustain the greatly expanded exemption claimed by the railroad company, it has been necessary for the court below to take judicial notice of a great variety of conditions and facts which it is urged tend to show what must have been the intention of Congress in creating and aiding the railroad company, and certainly such a necessity must be "in itself fatal to the claim set up," quite as much as the necessity of resorting to a preamble of an act "to assist in ascertaining the true intent and meaning of the legislature." In that preamble, things were distinctly and clearly set out so as to indicate what was within the contemplation of the legislature, and it was, therefore, much more certain and definite than any general view of the condition of the country and the circumstances surrounding the proposed construction of a railroad.

We call particular attention to the language of this court in a recent case, where it speaks as follows:

> The applicable rule is too well settled to require exposition or the citation of authority. The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the state to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt, and when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power.
>
> *R. R. Co. vs. Alsbrook, 146 U. S. 294.*
>
> *Keokuk R. Co., vs. Missouri, 152 U. S. 306.*

It is quite obvious from a mere casual examination of the opinion of the court below, that the language used by Congress in the act of 1866 as to the exemption, certainly "admits of reasonable contention," and this being so, "the conclusion is inevitable" against the position of the railroad company. We have cer-

tainly had a large amount of "reasonable contention" as to what the statute means.

In conclusion, it may be said that this court has never neglected any opportunity to reiterate its well-established doctrine upon this subject. In a recent case, decided in December, 1896, where the court was considering the question of the passage to a new corporation, which succeeded an old one, of the exemptions and immunities of the earlier corporation, the following language is used:

> These principles are in entire accord with the settled doctrines of this court. When a corporation succeeds to the rights, powers and capacities of another corporation, it does not thereby or necessarily become entitled to an exemption from taxation. An exemption or an immunity from taxation so vitally affects the exercise of powers essential to the proper conduct of public affairs and to the support of government, that immunity or exemption from taxation is never sustained unless it has been given in language clearly and unmistakably evincing a purpose to grant such immunity or exemption. All doubts upon the question must be resolved in favor of the public. There are positive rights and privileges, this court said in *Morgan vs. Louisiana, 93 U. S., 217*, without which the road of a corporation could not be successfully worked, but immunity from taxation is not one of them. In a recent case *(Norfolk & Western R. R. vs. Pendleton, 156 U. S., 667, 673,)* we had occasion to say, in harmony with repeated decisions, that, "in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions in restriction of the right of a state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or purchase under foreclosure, to the property and ordinary franchises of the first grantee:" and that this was a salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and expressed requirements of

the grant construed *strictissimi juris. Morgan vs. Louisiana, 93 U. S., 217. Wilson vs. Gains, 103 U. S., 417. Chesapeake & Ohio R. R. vs. Miller, 114 U. S., 176.*

Turnpike Road Co. vs. Sandford, 164 U. S. 586-7.

It is abundantly established by the decisions of this as of other courts that exemptions from taxation are to be strictly construed, and that no claim of exemption can be sustained unless within the express letter or the necessary scope of the exempting clause.

Ford vs. Land Co., 164 U. S., 666.

In the case just cited, this court, in harmony with the general principles to which it has constantly adhered, held that the effect of a statutory exemption from taxation should be restricted to something less than the absolute letter of the statute appeared to demand. A statute which exempted from taxation "all of the property and effects" of a corporation was held not to extend to some of the "property and effects" of that corporation because they were acquired under the authority of another statute passed at a later date than the one which contained the clause of exemption.

Ford vs. Land Co., 164 U. S., 666, 668-9.

These cases show the principle upon which is founded the rule that a claim for exemption from taxation must be clearly made out. Taxes being made the sole means by which sovereignties can

> maintain their existence, any claim on the part of any one to be exempt from the full payment of his share of taxes on any portion of his property must, on that account be clearly defined and founded upon plain language. There must be no doubt or ambiguity in the language used upon which the claim to the exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power.
>
> *Bank vs. Tennessee, 161 U. S. 146.*

The court below refers to the case in *150 U. S.*, at page 14, in support of its position that the grant should "receive a liberal construction in favor of the purpose for which it was enacted." This is strange, to say the least, because, in that case, on the same page 14, the court says that it is "the well settled rule of this court that public grants are construed strictly against the grantees;" and on page 13, it is stated that "exemption from taxation is construed with greater strictness in favor of the state than grants of public property or rights."

U. S. vs. D. & R. G. R. Co., 150 U. S. 13, 14.

VI.

"The existence of a well founded doubt is equivalent to a denial of the claim" to an exemption from taxation.

The words above included in quotation marks are taken from a recent opinion of this court.

Insurance Co. vs. Tennessee, 161 U. S., 177-8.

As hereinbefore sought to be shown, a mere inspection of the opinion of the court below clearly indicates the existence of at least "a well founded doubt." In that opinion great stress is laid upon a variety of extraneous facts, outside of the legislation of congress and outside of the record, of which the court takes judicial notice, all for the purpose of ascertaining the supposed intent of Congress in granting the exemption in question. Such elaborate discussion and consideration of matters of this kind could hardly have been necessary in order to sustain the conclusion reached by the court if it could be said that there was no "well founded doubt" in existence.

Attention is called to the case last above cited for the reason also that counsel there urged upon the court a variety of "surrounding circumstances" which it was claimed should influence the conclusion of the court as to the meaning of the statutes under consideration, but the court could not find in such matters any sufficient reason "to depart from the universal and well established rule making a claim for exemption a matter to be proved beyond all doubt."

VII.

There is more than enough to be found in the statute to give full effect to the intention of Congress to aid the railroad, without considering the exemption of the right of way at all.

None of the other land grant railroads received larger donations of land per mile than the Atlantic & Pacific, and it is believed that but one other had its right of way exempted from taxation. Legislation by Congress to provide aid to railroads began in 1862, and continued until long after the charter of the Atlantic & Pacific. The Union-Central Pacific line obtained the passage of its first act in 1862, and another in 1864, greatly increasing the benefits conferred by the first act. The disposition of Congress and of the country was such that the projectors of that line, the first to be constructed, could have obtained almost anything they chose to ask for, but it does not seem to have occurred to anyone to attempt to secure a perpetual exemption from taxation of nearly all the property of the road, by exempting its right of way.

The Atlantic & Pacific route was notoriously the least expensive to construct and operate of any of the proposed roads from the Missouri river to the Pacific coast, and yet it is seriously claimed that in order to give effect to the necessary intent of Congress to aid in its construction, we must hold that a perpetual exemption of almost everything was given in order to induce the investment of capital. The extent of this exemption will appear by comparing what the company has actually paid in any year with what it would pay had it not claimed this exemption. For the year 1893, in Valencia county, it paid as taxes on its property, outside of lands, the sum of $75.28. Upon its lands it paid $2,004.99.

Record in No. 169, pp. 56-7.

The tax claimed by the appellant on the disputed items for the same year, in the same county, amounts to $23,064.63.

Same Record, p. 30.

The record shows that there were over ninety miles of road in Valencia county, and eight stations, worth over $400,000.

Same Record, p. 82.

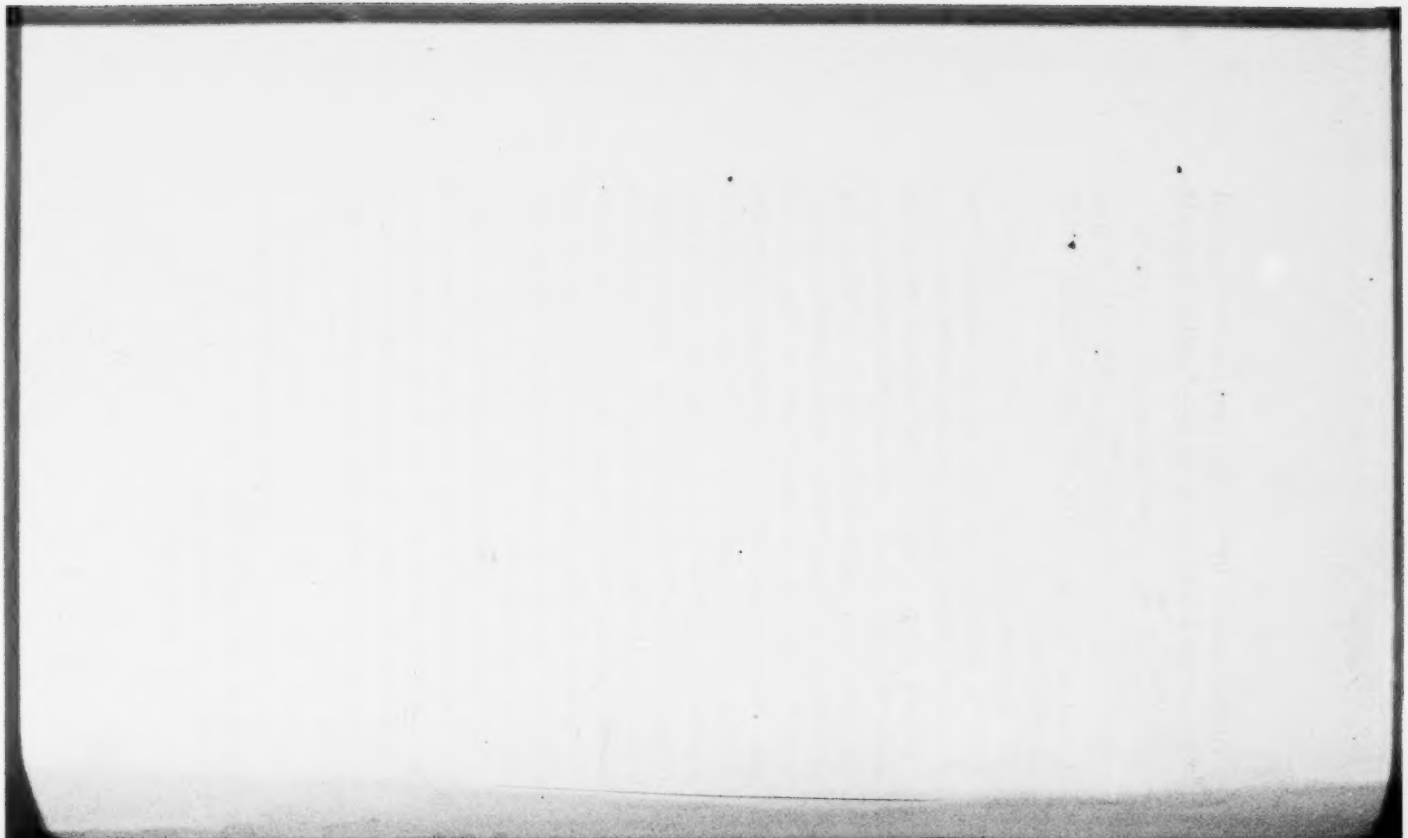
Let us consider what this railroad company was given by Congress aside from this exemption:

It was given a right of way through the public lands; the right to take from the public domain adjacent to the road material of earth, stone, timber and so forth, for the construction thereof; lands to the extent of 12,800 acres per mile where the road should pass through any state, and 25,600 acres per mile through the territories, and the right of eminent domain. It was also expressly declared to be a post route and military road, which, while imposing certain duties towards the government, gives it privileges and immunities which it might not otherwise enjoy. The estimated length of the line when projected was about 2,500 miles, and the lands granted would amount to over 50,000,000 acres.

No reason can be found for expanding this exemption from taxation beyond the necessary meaning of the words employed in the statute, nor for applying to it any rule of construction different from that which has been so often announced in the opinions of this court.

F. W. CLANCY,
Solicitor for Appellant.

FELIX H. LESTER,
THOS. N. WILKERSON,
Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1898.

Nos. 106, 107 and 108.

THE TERRITORY OF NEW MEXICO, Appellant,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK, ET AL.

REPLY BRIEF OF APPELLANT.

F. W. CLANCY,
Counsel for Appellant.

In the Supreme Court of the United States.

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THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

REPLY BRIEF OF APPELLANT.

Appellees in their brief make nine "Points" which are as follows:

> "*First Point.* From the terms of the act approved July 27th, 1866, read in the light of the history of the times when it was passed, it is clear that Congress intended to prohibit each one of the Territories through which it might pass, from interfering by way of taxation with the railroad it was seeking to have built."
>
> "*Second Point.* It must be presumed that Congress knew the rule of the common law that fixtures attached to the freehold become a part thereof, and intended that this rule should apply to fixtures to be placed by the railroad company upon its right of way, so that such fixtures would become as completely a part of the right of way as the soil, the rocks and the trees composing the same at the time of the grant thereof."
>
> "*Third Point.* Congress intended that the right of way of the Atlantic and Pacific Company which

was provided for in the act under consideration, should be an estate in fee simple."

"*Fourth Point.* The grant of exemption from taxation of the 'right of way' contained in the second section of the act, exempted all improvements that Congress intended should be placed upon such right of way for the purpose of building and operating the railroad contemplated by the act."

"*Fifth Point.* If the question of the scope of this exemption be at all doubtful, the practical construction placed upon it by the Territory and its officers charged with the execution of the revenue laws, ought to receive great weight, if it be not controlling so as far as this Territory is concerned."

"*Sixth Point.* There is no provision in the laws of the Territory of New Mexico authorizing the segregation of the superstructure from the right of way of any railroad for purposes of assessment or taxation, and, therefore, the assessments in question were void."

"*Seventh Point.* The burden is upon the Territory to make it clearly appear that it has the right to assess for the purpose of taxation a part of an estate which Congress has declared exempt in such Territory from taxation either by Congress or the Territory."

Eighth Point. This is not formulated like the others so that it can be quoted. Its purpose appears to be to set out the absurdity of an opinion of the Supreme Court of Arizona; an erroneous statement that that Arizona case and one in Maine are the entire authority of appellant for its proposition that the superstructure is not a part of the "right of way" for purposes of taxation; and to reiterate the assertion that a Territory has no power to tax any portion of this railroad, and therefore appellant's brief is not applicable to the case.

"*Final Point.* The levies of taxes sought to be recovered by the intervening petitions in the three cases now before this court are illegal and void, re-

gardless of any question of exemption or of any statutory authority of the Territory of New Mexico."

There are some things under each of these points which require some reply; but before proceeding to consider them in detail, attention must be called to the fact that counsel for appellees devote a great amount of space to showing that the property sought to be taxed is "real estate," as though the proposition were disputed by appellant; and, indeed, on pages 29, 32 and 55 of their brief they quite distinctly intimate that appellant's claim is that the property is personal, and has been assessed as such. At no stage of these proceedings, from their initiation in the District Court in New Mexico to the the present time, has the Territory claimed this property to be personal property, but has always asserted it to be "real estate," and taxable as such, under the statute from which quotation is made on page 10 of the original brief herein; and that, under that statute, it was, for purposes of taxation, separable from the soil to which it is attached. It was not necessary for appellees to struggle so hard to prove the "real estate" character of this property when appellant asserted the same thing.

Attention is also called to the fact that running through nearly all of the argument in the brief for appellees, and underlying and permeating the reasoning therein, is the idea of the inferior character of a territorial government and of the little weight to be given to territorial legislation, although there is no direct attempt to answer the argument in the original brief for appellant, at pages 16 to 23, which shows conclusively that territorial legislatures possess all the power of Congress itself when legislating for the territories, subject only to the express limitations imposed by Congress itself. It must be assumed that counsel for appellees could find no answer to this proposition.

We will now proceed to consider in detail so much of the brief for appellees as calls for special reply.

Appellees' First Point.

There is but little under this heading which requires notice. Counsel give some interesting historical information about the country at the time the railroad company was created, all with a view to inducing the court to hold that an exemption of the "right of way" means an exemption of the whole railroad and telegraph line, because Congress surely intended to be very liberal and generous. They declare that the Union-Central Pacific lines received—

> "actually larger land grants than were given by Congress to any of the other railroads afterwards created by it."

It is submitted that this is a mistake, but in discussing it, it is not admitted that it is proper or material for consideration in ascertaining the meaning of "right of way."

By reference to "The Public Domain" at pages 270 and 271, it will be found that the lands patented to the Union Pacific, with those estimated as necessary to complete the grant, amount to 11,097,082.49 acres, and the lands of the Central Pacific reach 7,638,589.75 acres, or a total for the two of 18,730,672.24 acres; while the lands of the Atlantic and Pacific are 23,176,536.50 acres, or nearly five million acres more than the Union-Central Pacific line.

Moreover, this road was notoriously less expensive to construct than the others, and was so known to be in 1866.

It is urged that Congress would not have given anything so worthless as the exemption of the mere right of way from taxation and therefore intended more. As this court said in the cases of *Railroad Co.* vs. *Dennis, 116 U. S. 665*, and *Railroad Co.* vs. *Thomas, 132 U. S. 184*, this argument—

> "rests too much on inference and conjecture to afford a safe ground of decision where the words of the statute creating the exemption are plain, definite and unambiguous."

But it is not true that the strip of land covered by the right of way is so utterly worthless, or was reasonably so to be considered when the exemption was granted. Wherever a town would grow up or agricultural land be brought under cultivation, this despised strip of land, over 24 acres to the mile, would be of great value. As an instance, attention is called to the land occupied for railroad purposes by the Atchison, Topeka and Santa Fe and Atlantic and Pacific Railroads in the present city of Albuquerque. That land, if valued at anything like the values of adjoining land of individual owners, must be considered as worth hundreds of thousands of dollars. Similar conditions undoubtedly exist in many other places.

Railroad Co. vs. *Baldwin, 103 U. S. 430.*

Appellees' Second Point.

It is cheerfully admitted that Congress knew the common law rule that fixtures attached to the freehold become part thereof; but it is denied that it intended, or ever dreamed of, any such application of that rule to fixtures to be placed by the railroad company upon its road, as would make them a part of the easement which it granted. As counsel state this point, they assume that "the soil, the rocks and the trees" compose the "right of way." This goes far toward assuming what they evidently consider the vital part of their case.

They insist that "right of way" means the same things as roadbed, track, bridges, etc., etc., but they are unfortunate in their quotation and authorities cited to sustain this position. On page 22 they quote from *Elliott on Railroads*, but that writer in that quotation plainly shows that he considers "right of way" as something other than roadbed, tracks, etc.

On page 24, of their brief, counsel for appellees quote from the case of *Joy* vs. *St. Louis, 138 U. S. 1*, to show that

a track is a part of the right of way. The question upon which the court was passing in the portion of the opinion from which this quotation is made, was as to whether a contract for the use of a right of way included use of tracks when existing tracks occupied the whole of the land covered by the right of way; and the court, including what is quoted in appellees' brief, spoke as follows:

> "The evidence shows that the entire right of way is occupied with tracks and sidings, so that there is no room for another and independent track, and that the entrance into the Union depot over the tracks of the Wabash Company, is the only practical route for the road of the Colorado Company, to that depot. As the Kansas City Company had the right to cover its right of way with main and side tracks so that there should be no room on such right of way for the tracks of any other railroad, it would be in its power to defeat the intent of the agreement if the right of way should be held not to include the tracks. Moreover, as the County company and the Kansas City company were tenants in common of the right of way through the park and to the east end of the cut, each company had the right to use the whole of the right of way, subject to the right by the other company to use the whole of it. Hence, the grant to other roads of the privilege of using the right of way applied to the whole of such right of way through the park, and not to a particular part of it. The track can not be separated from the right of way, the right of way being the principal thing, and the track merely an incident. A right of way is of no practical use to a railroad without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way."
>
> *Joy* vs. *St. Louis, 138 U. S.*

This has no application to anything in dispute in the present case. It does not tend to show that when Congress speaks of a "right of way" it was intended to include the

improvements which might at any time be placed on the land covered by the right of way.

On pages 24 and 25 of appellees' brief, appears a quotation from an opinion of Mr. Justice Brewer, bearing upon what is meant, and covered, by the term "right of way." It does not tend strongly to support appellees' position; and a little further along in the same opinion, in discussing the applicability of a statute of limitations, the learned judge uses language which shows how little foundation there is for that position, and expresses views with regard to the character of the interest which a railroad company has in the land over which it claims a right of way, which are the views of every lawyer unbiased by the exigencies of some particular case, as follows:

> "But it is urged that the statute only applies where the legal title is taken to land—where the fee is claimed; and that it does not apply to the case of an easement—a right of way. Well, your statute at the time these condemnation proceedings were had, authorized the appropriation of the fee or the use. I think it must be conceded, however, that, unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use. The record of those proceedings is not entirely clear, but I think the fair construction to put upon it is that the railroad was seeking to take no more than needed, and that was the easement—the use.
>
> *Keener* vs. *U. P. R.R., 31 Fed., 128.*

Clearly, that court was not of the opinion that the right of way of a railroad company is "an estate in fee simple."

On page 25 of their brief, counsel for appellees quote from the opinion in *Railroad Co.* vs. *United States, 93 U. S. 442.* In that quotation it is said that:

> "The forms of legislative expression thus adopted and coming down from a period when they had

> greater practical significance than they now have, bring with them an established sense which renders them free from all uncertainty and doubt."

That is just what appellant claims about "right of way." It had "an established sense" which renders it "free from all uncertainty and doubt." What lawyer in 1866 ever imagined that "right of way" included roadbed, tracks, telegraph lines, station houses, etc.,—everything that might be fastened to the ground for the corporate purposes of a railroad company? The popular use of the phrase, as synonymous with land, has certainly grown up since that time.

On pages 26–7 of their brief, counsel for appellees refer to the case of *Milhau* vs. *Sharp*, *27 N. Y., 620*, in which the court held void an ordinance giving a right to build a street railroad on Broadway, but the reason for such holding is not clearly or accurately stated in appellees' brief. They say it was—

> "because of the fact that upon building the road it would become permanently attached to and a part of the fee which the city authorities would thereby surrender the right to use for a public street."

This seems to indicate some confusion of ideas, because, so far as I can discover, the court did not so hold, but really declared the ordinance void because the city had no authority to grant such a franchise (*pp. 619–20*), and intimates that the fee of the street was not vested in the city (*p. 623*); and, in summing up the reasons for holding the ordinance void, the court says:

> "The resolution is, therefore, void, for the reasons that it purports to create a franchise which the common council had no power to create; to vest in the defendants an exclusive interest in the street which the common council had no power to convey; and to divest the corporation of the exclusive control of

> the street which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish." (*P. 622.*)

On page 27 of their brief, counsel for appellees refer to the case of *People ex rel.* vs. *Cassity, 46 N. Y. 46,* and say that—

> "the court held that the taxing officers had a right to tax the real estate upon which the superstructure was laid, and that necessarily the superstructure was included in such taxation as real estate."

This is erroneous. The court did not so hold, as will appear by reference to the opinion, all of the material portion of which will be found on pages 11–12 of appellant's original brief in this case.

At pages 28–9 of their brief, counsel for appellees cite five cases to sustain the proposition that the term "right of way," applied to railroads, has a very broad and inclusive meaning—so broad as to include large tracts of land covered with tracks, shops, depots, stock-yards, etc. These cases are so cited upon a material proposition as to require some notice. They are:

C. & A. R. Co. vs. *Dennison, 98 Ill., 350.*
Pfaff vs. *Railroad Co., 108 Ind., 144.*
Railroad Co. vs. *Cass County, 76 N. W., 239.*
State vs. *Railroad Co., 35 N. J. L., 537.*
Railroad Co. vs. *Venango County, 38 Atl., 1088.*

In the Illinois case the court held that the right of way included thirty-two acres of land covered with tracks and other railway property, because the statutory definition of a railroad right of way required it. That statute is quoted by the court at page 356, and is as follows:

> "Sec. 42. Such right of way, including the superstructures, with main, side or second track and turnouts, and the station and improvements of the

> railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof, as a strip of land extending on each side of such railroad track and embracing the same together with the stations and improvements thereon."

What has a decision, under such a statute, to do with the meaning of the term "right of way" in the present case?

In the Indiana case, the decision is the same as in the Illinois case, under a statute almost exactly the same, and so declared to be by the court at page 151, where it is said to be the same as the Illinois statute in every material feature.

The North Dakota case, reported in *76 N. W.*, was one in which the question decided was as to the construction of language in the constitution which declared that certain property of railroad companies should be assessed by the state board of equalization; and the court gave the word "roadway" a very broad meaning so as to include everything used in connection with the actual operation of the road. The very question involved in the present case, as to whether improvements can be assessed separate from land, was argued, but the court refused to pass upon it, as being unnecessary to its decision of the case, but there is nothing about "right of way."

In the New Jersey case the controversy was as to taxing land and a branch road leading to it, the land having been purchased by the company for the gravel which was on it, to be used in ballasting the road, the statute of the state having provided a percentage method of taxation of the railroad company, and declared "that no other or further tax or imposition shall be levied or imposed upon said company," (*p. 538.*) There was some dispute as to whether the

gravel-pits and branch road were necessary or merely convenient; and the court held that they approximated to pure necessity, (*p. 547*) but said that necessary meant what was "suitable and proper to accomplish the end that the legislature had in view." There was no attempt to broaden the ordinary meaning of right of way, nor was any such question involved.

The Pennsylvania case, reported in *38 Atlantic*, merely decides the point that a shop for repairs in the business of the railroad company was a necessary part of the equipment of the railroad, and therefore not taxable by local authority, such property being taxable by the state, although a shop for the construction of locomotives and cars would be taxable by local authorities, as had been previously decided in other cases.

It may well be asked, what have any of these cases to do with the proposition which they are cited to support?

Appellees' Third Point.

This is the most important point to appellees' case, although they declare that they regard it as "a matter of very little importance."

They assert that Congress intended that the right of way "should be an estate in fee simple." (*Page 32 of their brief.*)

As to the case of *Railway Co.* vs. *Roberts, 152 U. S. 114*, upon which appellees so greatly rely, and the only one in which a word can be found even *seeming* to support their contention, in addition to what is said in appellant's original brief, at page 8, attention is called to the fact that an examination of the opinion of the Supreme Court of Kansas in the same case, clearly shows that the question involved was as to the right of possession only, and that the case stood in the state courts exactly as actions of ejectment stand almost everywhere, as one brought to recover possession of the land, although, of course, a claim of title might incidentally arise in determining the right of possession. All

that was necessary, however, to the decision of the case was, as Judge Ross holds, in effect to pass upon the question as to whether the railroad company had a right to the exclusive possession of the land without regard to the grade of its title.

R. W. Co. vs. *Roberts, 43 Kan., 103 et seq.*

On page 34 of appellees' brief, quotation is made from the syllabus of a California case to show that the grant of a right of way to a railroad company is not the grant of "a mere easement." The statement in that syllabus that the act of Congress "did not grant a mere easement for the construction and operation of its road," does not appear in the opinion of the court. All that was decided was that the act made "a special grant of a right of way two hundred feet in width on each side of the road," and that the company was entitled to the exclusive possession of the land so described, and could therefore maintain an action of ejectment to recover that possession.

R.R. Co. vs. *Burr, 86 Cal., 279.*

In support of their contention that by the definite location of the line of the Atlantic and Pacific Railroad, an estate in fee in the land included in the "right of way" vested in the company, appellees cite, at page 36 of their brief, the case of *R.R. Co.* vs. *Alling*, in which this court, through Mr. Justice Harlan, speaking of what was intended by Congress in granting a right of way to a railroad through the public domain, declares, as any lawyer naturally would—

> "that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and in good faith appropriated for the purposes contemplated by the charter of the company and the act of Congress."

R.R. Co. vs. *Alling, 99 U. S., 475.*

In this case the court held that the Denver and Rio Grande Railway Company had a prior right to a right of way through the Grand Cañon of the Arkansas, subject to the right of another company to use the same right of way, and even the same track in narrow places where two tracks would be impracticable. This latter right was in consequence of a later act of Congress, and the court refused to pass upon the question as unnecessary, as to—

> "whether Congress might legally have subjected the Denver Company, without its consent, to the provisions of the Act of March 3, 1877, had that company actually located and constructed its road in or through the Grand Cañon within five years after the passage of the Act of June 8, 1872."
>
> *Same case, p. 480.*

This would indicate that it was at least a debatable proposition as to whether the grant of such a right of way by Congress to a railroad was absolute, as claimed in the present case, because if the grant were of that nature, there could be no pretense of later control by Congress; and it also shows that "right of way" does not include track.

The other cases cited on page 36 of appellees' brief do not tend to support their position or to assist in the elucidation of the questions involved.

In this connection attention must again be called to the case, already cited, of

Keener vs. Railroad Co., 31 Fed. 128.

This court in considering the effect of deeds conveying land as a right of way to a railroad company for the purpose of establishing a railroad thereon, said:

> "The right granted was merely a right of way for a railroad. It was granted to an existing corporation which had a franchise. The grant to the 'assigns' of the corporation cannot be construed as extending to any assigns except one who should be the assignee

of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words 'forever in fee simple' enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law, or separate from the franchise to make and own and run a railroad. The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired is merely an easement on the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor. By the terms of the charter of the Lafayette Branch Company, it was given the power to purchase, hold, lease, sell and convey real, personal and mixed property, so far as it should be necessary for the purposes mentioned in the act, namely, to construct and operate the specific railroad authorized therein, with power to 'lay and collect toll from all persons, property, merchandise or other commodities transported thereon.' By the terms of its charter, therefore, in connection with the terms of the deeds of the right of way, that right was indissolubly linked to the franchise, and to the purpose of the existence of the corporation, and to its public functions, so long as they shall exist. It would violate not only the expressed intentions of the grantors in the deeds, but the manifest purpose of the legislature of Alabama, to permit a private person to seize and appropriate the right of way by the purchase of anything at a judicial sale apart from the franchise on which the right of way was dependent. The sheriff's deed purported to convey in words, 'the said tract of land or railroad-bed, to wit: the right of the Opelika and Oxford Railroad, so far as the right of way has been obtained, from Lafayette to the edge of Lee County, and all the appurtenances belonging to said road from Lafayette to the line of Lee County.' If the deed undertook to convey any land or soil or road-bed, it conveyed with it the right of way. The

> deed, in reciting the levy, states that it was made 'on the following tract or lot of land as the property of the said railroad company, to wit: the right of way,' etc., and states that that was what was sold. It was not lawful for the purchasers to have a deed of the right of way, and if they obtained a deed of anything, the right of way was included, or else they received nothing beyond, perhaps, a right to carry away from the land what the company had put upon it."
>
> *East Alabama R. Co. vs. Doe, 114 U. S., 350–1.*

The words of conveyance in the deeds under consideration in the above case were certainly stronger and better calculated to convey an estate in fee than those to be found in the second section of the act of Congress of 1866.

Appellees' Fourth Point.

This is to the effect that the exemption of the "right of way" exempted all improvements which Congress intended should be placed thereon. In other words, as shown by the whole brief, appellees contend that "right of way" is the same thing as, or includes, in the words of the assessment in case No. 106, "the improvements, cross-ties, rails, fish-bar plates, bolts, bridges, culverts and structures together with the telegraph line" of the company, and all "station houses, shops, depots, switches, water tanks and improvements" at the different towns on the line. This is not in harmony with the unvarying rule of this court as to strictness of construction of exemptions from taxation, but the appellees have assured the court that this rule does not apply to them.

The authorities cited by appellees in support of this point are all cases where state courts have shown some liberality in the construction of exemptions from taxation, holding that general words of description of exempt property include all the particular things which can possibly belong to the general description. It is doubtful, to say

the least, whether this court would ever go as far as some of these cases, but none of them hold that a narrow, particular term of well-known, limited, time-honored significance, such as "right of way," can, by construction, be so expanded as to include everything connected with the land over which the right of way may be exercised.

On page 41 of their Brief, by dovetailing a contention of counsel with the language of the court, counsel make it appear that the supreme court of Massachusetts, in *Inhabitants of Worcester* vs. *Railroad Co., 4 Met., 564*, decided that "right of way" included the structures on the land; but an examination of the opinion will show that the court decided nothing of the sort.

The opinion of the learned Chief Justice of the supreme court of New Mexico, which is highly commended in appellees' Brief, reads very beautifully, and if mere form were sufficient, would be very convincing. He says that Congress tendered the inducements it deemed sufficient to secure the construction of the railroad—

> "not the right of way over the land, but the right for a railway; not the right to the soil only, but the right to the roadbed; not the right to the roadbed only, but to a roadbed equipped with ties and rails, to constitute a railway over which cars could be conducted for the lawful purposes of the government; not only the right to a roadbed so furnished, but to a railroad provided with the fixtures essential to the fulfillment by the corporation of the purposes for which it was created." (*Record in No. 106, p. 72.*)

From all this he draws the conclusion that Congress also intended to exempt from taxation all the inducements which it tendered. But why stop where he does? Of what use would the railroad be at the point at which he leaves it? Until equipped with a thousand locomotives and ten thousand railroad cars it would be of but little practical value. Why not add all the rolling stock and every other appli-

ance necessary or convenient to the full, complete and profitable operation of the railroad to the other things which it is assumed Congress intended to offer, and by the same sort of illogical reasoning reach the conclusion that, when the right of way was exempted from taxation, that exemption must extend to all these other things which Congress ought to have had in contemplation?

The learned counsel for appellees are clearly opening the way for this claim of exemption, and, if they can lead this court to the point of declaring as they contend, that the railroad and telegraph line are only parts of the right of way, which is exempt, they can confidently go before the local tribunals of Arizona and New Mexico, and there contend that the railroad being exempt from taxation, this exemption must extend to everything used in the operation of the road, whether rolling stock, hotels, warehouses or anything else however remotely connected with the business of the company, and will rely upon such authorities as are cited on pages 37 to 42 of their brief in this case, which show that some state courts have thus held with reference to such exemptions.

Appellees' Fifth Point.

This needs but little attention. Appellees urge that the neglect of the territorial officers to assess this property for a number of years is a practical construction of the statute which estops their successors. This sort of argument was made to this court in the cases of *R.R. Co.* vs. *Dennis, 116 U. S.*, and *R.R. Co.* vs. *Thomas, 132 U. S.*, in the first of which there had been an omission by the state officers to assess for twenty-five years, but the court held that this fact could not—

> "control the duty imposed by law upon their successors, or the power of the legislature or the legal construction of the statute under which the exemption is claimed."

Moreover, if such an argument were sustained, we would have the incongruous and ludicrous result that in one of the territories this property would go untaxed because its officers were negligent; while in another, Arizona, it would be taxable because there the officers had been earlier aware of their duty.

A. & P. R.R. Co. vs. *Lesueur, 19 Pac., 157.*
A. & P. R.R. Co. vs. *Yavapai County, 21 Pac., 768.*

As to the case of *Northern Pacific Co.* vs. *Carland, 5 Mont., 146*, it must be admitted that the court of Montana did say that the exemption of the right of way extended to such property as is sought to be taxed in the present cases; but it is equally true, as pointed out by the supreme court of Arizona in the case above cited, that this part of the Montana opinion is *obiter dictum*, entirely unnecessary to the decision of the case. It is to be noted that even the Montana court declared the right of way to be an easement.

Appellee's Sixth Point.

Here the position is taken by appellees that there is no statute of New Mexico which authorizes the assessment of the superstructure for taxation separate from the right of way.

Sections 2807 and 2834 of the Compiled Laws of 1884, which are quoted on pages 45 and 46 of appellees' brief, certainly contain the authority which appellees deny. In section 2807 it is declared that "real estate" includes "improvements," and that "improvements" includes—

> "all buildings, structures, fixtures and fences erected upon or affixed to land, *whether title has been acquired to said land or not.*"

Section 2834 requires the assessor to make out an assessment book, "with appropriate headlines," which must contain among other things "the several species of property and the value as hereinbefore indicated." Certainly "im-

provements" is one of the said "several species of property," and the assessment books in New Mexico, ever since the enactment of the statute in 1880, have always been made to show "Value of Land" and "Value of Improvements" separately. The form will be found in the Record in case No. 106, between pages 42 and 43.

There is no reasonable doubt of the meaning of the statute, but, if there were, this would be a proper matter to which to apply the doctrine of practical construction of a statute by the officers entrusted with duties under that statute, and the authorities cited by appellees under their "Fifth Point" would be appropriate.

Moreover, statutes of this kind are entitled to a most liberal construction for the purpose of preventing the escape from taxation of any property which ought to bear its share of the expenses of government. Authorities need not be cited in support of this well-established rule.

On page 47 of their brief, counsel for appellees seek to deprive the case of *San Francisco* vs. *McGinn, 67 Cal., 110*, of all weight by pointing out that the constitution of California, which went into effect in 1879, requires that "lands and the improvements thereon shall be separately assessed." It is impossible to see how this provision can affect the value of the decision in the case cited, if it had any bearing upon it; but an examination of the opinion will show that it was not based on that constitutional provision and could not properly have been so, as the lease under consideration had been made in 1875, four years before the constitution of 1879 went into effect. This case is fully quoted from in appellant's original brief at pages 12–13.

In addition to the cases heretofore cited by appellant, on this point, attention must be called to some New York decisions under a statute similar to the New Mexican statute. The New York statute reads as follows:

> "Sec. 2. The term 'land' as used in this chapter, shall be construed to include the land itself above

and under water; all buildings and other articles and structures, substructures and superstructures erected upon, under or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges; all telegraph lines, wires, poles and appurtenances; all surface, underground or elevated railroads; all railroad structures, substructures and and superstructures, tracks and the iron therein; branches, switches, and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street, or grounds; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place; all trees and underwood growing upon land; and all mines, minerals, quarries and fossils in and under the same except mines belonging to the state. The term 'real estate' and 'real property' wherever they occur in this chapter shall be construed as having the same meaning as the term 'land' thus defined."

2 Rev. Stat. N. Y. 7th Ed., p. 981.

With the above quoted statute in force, a case was decided in the court of appeals in which it appeared that the relators rented land from the Brooklyn Benevolent Society and erected buildings thereon. The real and personal property of the society was by statute exempt from all taxation whatsoever, except for local improvements, so long as the revenues should be disposed of according to the directions of the charter. It was held that the exemption did not extend to the buildings, but they must be assessed as the property of the relators, although the land to which they were affixed was exempt from taxation; and it was argued by counsel, as in the present case, that they had become a part of the realty, and were consequently exempt from taxation.

People ex rel. vs. Assessors, 93 N. Y., 310–313.

It is to be noted that there was nothing in the statute,

any more than in the New Mexican statute, in terms authorizing the assessment of improvements separate from the realty to which they are attached; but the judges of the court, disregarding precisely the same argument now urged here by counsel for appellees, found no difficulty in holding that they could and should be so assessed.

In another New York case, decided under the same statute, the plaintiff sought to have assessments of taxes declared void on the ground that they were a cloud on his title. It appears that he was the owner of a wharf erected on certain land which had been granted by the city in 1852 for the purpose, and was then under water, which wharf was to be a public wharf, but as to which the grantees had a perpetual right to collect wharfage, etc. The court said that, under the statute above quoted, upon the assumption that the fee to the land under water, upon which the pier was constructed, was reserved to, and remains in, the city, yet the pier was real estate for the purpose of taxation. Referring to the statute, the court said:

> "Under the definition of land thus given, one may be taxed as owner of the fee of land, and another for the trees, buildings and other structures thereon, and the mineral and quarries therein."
>
> *Smith* vs. *The Mayor, 68 N. Y., 554.*

It is somewhat difficult to understand why counsel for appellees, on page 47 of their brief, cite two decisions of this court, reported in *118 U. S.* and *127 U. S.* In the first one, on the point of the invalidity of an assessment, the court said:

> "The case, as presented to the court below, was, therefore, one in which the plaintiff sought judgment for an entire tax arising upon an assessment of different kinds of property as a unit—such assessment including property not legally assessable by the state board, and the part of the tax assessed against the latter property not being separable from

> the other part. Upon such an issue, the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied."
>
> *Santa Clara* vs. *Railroad Co., 118 U. S., 394.*

The other case is to the same effect; but what has this to do with the case under discussion? There was no such assessment as in California; but, on the contrary, appellees complain that we have been too specific and definite in our assessments.

Appellees' Seventh Point.

Here is an attempt by appellees to reverse and overturn the whole doctrine of this court on the subject of exemptions from taxation. Instead of requiring the claimant to show beyond a doubt that he is entitled to such exemption, the taxing power must assume the burden of making it clearly appear that it has the right to assess the property which seeks to escape its due share of the burden of taxation.

In this proposition is involved the assumption, hereinbefore referred to as running through the whole of appellees' argument, that there is something so inferior about a Territory that a different rule is to be applied to a controversy between it and this railroad from what would be proper if the controversy were with the national government. There is no foundation for this assumption and nothing can be found in the brief of appellees to justify it.

As to this, appellant again refers to what appears in its original brief at pages 16 to 23, to which no answer has been made.

On page 50 of their brief counsel for appellees cite ten cases, the array of which looks quite formidable, but, upon close examination, they do not seem to have much bearing on the present case, nor to support the "Seventh Point" under which they appear.

The first case cited is one in which this court held that a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act, such repealing act being void under that clause of the Constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

New Jersey vs. *Wilson, 7 Cranch, 164.*

Appellees cite another case in which this court decides that a general banking law enacted by the State of Ohio in 1845, which required officers of banks to make semi-annual dividends, and the payment of six per cent. of such dividends for the use of the State which should be in lieu of all taxes to which the bank would otherwise be subject, made a contract fixing the amount of the tax, and could not be changed by a subsequent legislature.

Bank vs. *Knoop, 16 How., 369.*

Appellees cite, also, two other cases which decide precisely the same point under the same statute.

Dodge vs. *Woolsey, 18 How. 331.*
Jefferson Bank vs. *Skelly, 1 Black., 436.*

Appellees cite also a case in which this court decides that a State authorizing a municipal corporation to issue bonds and to exercise the power of local taxation in order to pay them, constituted a contract within the meaning of the Constitution, and that the authority can not be withdrawn until the contract is satisfied.

Von Hoffman vs. *Quincy, 4 Wall., 535.*

They cite also a case in which it is held that an exemption of the property of a corporation from taxation becomes

a contract after the corporation is organized, and its obligation can not be impaired by subsequent State legislation.

Home of the Friendless vs. *Rouse, 8 Wall., 430.*

They cite also a case in which this court holds that a charter of incorporation granted by a State creates a contract which the State can not violate; and that the exemption from taxation by such a charter of the property of a railroad company covers its franchise and rolling stock, the franchise being property as much as anything else.

Railroad Co. vs. *Reid, 13 Wall., 264.*

They cite another case which declares the same rule as to the nature of such a legislative contract with a corporation, but an earlier general statute, subjecting all charters to amendment, alteration or repeal, was held applicable and really a part of the contract, so that the State legislature had power to change the charter.

Tomlinson vs. *Jessup, 15 Wall., 458–9.*

They cite also two cases from Ohio which hold that where the State by the act incorporating the Ohio University gave that institution land and authorized perpetual leases of the land, the leased lands to be forever exempt from taxes, the acceptance of leases constituted a binding contract between the State and the lessees which can not be impaired by subsequent legislation attempting to tax the lands.

Matheny vs. *Golden, 5 Ohio St., 361.*
Kumler vs. *Traber, 5 Ohio St., 442.*

Appellees' Eighth Point.

Appellees admit that there is one case opposed to their contention, but their comments upon it indicate that they have given it but little attention, probably because they

consider it of little importance. They say, on page 51, that, in that case, the court finds—

> "that the 'right of way' is an interest in realty, and that the superstructure placed upon it became part of this 'right of way,' and then proceeds to hold that the exemption from taxation of the 'right of way' did not exempt the superstructure, because of the fact, so far as one can determine, that there was no express exemption in the act, of the superstructure as such."

A more inaccurate statement of the effect of the admirable opinion referred to can hardly be imagined. It is correct only so far as it states that the court holds that the right of way is an interest in realty. It does not hold that the superstructure became part of the right of way. If it did, of course there could be but one conclusion, and that in favor of the railroad company. The attention of the court is most earnestly invited to this opinion, as being clear, well reasoned and convincing on every material point now in controversy. Appellees urge that the opinion is unworthy of respect because it holds that the Territory has power to tax the franchise of the company. The only reason suggested against such power is that this court has held that a State can not tax the franchise of a corporation which is a national agency, although it may tax its property, but appellees here ignore the argument as to the character and power of the territorial governments upon which appellants rely, and to which no answer has been, or can be, made. Congress could tax such franchise, and it has delegated its taxing power to the Territory without any limitation as to franchises. In New Mexico no attempt has been made to tax the franchise.

Counsel for appellees further state, on page 51 of their brief that this Arizona case and one from *60 Me.*, constitute the entire authority of appellant for its proposition that the superstructure is not a part of the "right of way." This

is an error. Appellant has cited, in its original brief, the cases of—

People vs. *Casity, 46 N. Y. 48–50.*
People vs. *Commissioners, 82 N. Y. 462–3.*
San Francisco vs. *McGinn, 67 Cal. 110.*
People vs. *Shearer, 30 Cal. 656.*
Crocker vs. *Donovan, 30 Pac. 377.*
Turney vs. *Saunders, 4 Scam. 527.*
Gold Hill vs. *Caledonia Co. 5 Sawy. 575.*
A. & P. R. Co. vs. *Lesueur, 19 Pac 159.*
Portland R. R. Co. vs. *Saco, 60 Me. 196.*

Upon this point, appellant has cited in the present brief, the cases of—

Smith vs. *The Mayor, 68 N. Y. 554.*
People vs *Assessors, 93 N. Y. 310–313.*

It is insisted that these cases are all pertinent, strongly persuasive, and entitled to great weight in the consideration of this question.

A statement is made on page 54 of appellees' brief, that in the assessments in Valencia County penalties of one-fourth of the assessed value have been added. This is a mistake, as will appear by reference to the assessments themselves at pages 80 to 84 of the printed Record in case No. 169. The records do not disclose any disposition to oppress or unfairly to treat the railroad company. No complaint has been, or can be, made as to the valuation of its property. The assertion of the claims of the Territory in these proceedings was made necessary by the foreclosure suit, as a matter of fairness and justice to any one who might purchase the property under the decree of the court.

Appellees' Final Point.

The proposition here is that the clause as to exemption from taxation, contained in the second section of the act of Congress of 1866, about which this whole controversy has

heretofore been carried on, is of minor importance, or rather of no importance, because the Territory cannot tax the railroad at all for the reason that the government, by virtue of the provisions of the eleventh section of the act, has such a proprietary interest in the property as to exempt it entirely from taxation. This is no more startling than the discovery by appellees of the all-inclusive meaning of the innocent-appearing common law phrase, "right of way."

But little need be said about this. There is no attempt to tax the interest of the government, whatever it may be, nor to proceed in any way so as to diminish the value of that interest; and the reasoning of this court, in the opinion from which quotation is made, at pages 57 and 58 of appellee's brief, strongly supports the right and power to tax the visible property of the railroad company.

Enforcement of the Tax.

Counsel for appellees repeatedly express great apprehension as to the disastrous effect of sustaining the taxing power of the Territory, because, as they assume, the only possible way of enforcing the payment of the tax is by a sale of a section of the railroad, which would in effect destroy it. They refer to the doctrine that "the power to tax involves the power to destroy," and seem apprehensive that this destruction will be brought about in the manner above indicated in compelling payment of taxes. This is not the "power to destroy" included in the power to tax; but a moment's reflection, and a brief examination of the law, will show how little ground there is for the fears of appellees.

The section of the New Mexican statutes as to taxes being liens is as follows:

> "Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the

> date of the levy thereof; and taxes due from any person upon personal property shall not be satisfied, nor the lien removed, until the taxes are abated or paid, or the property sold for the payment thereof. The tax list and warrants hereinbefore provided for shall have the force and effect of an execution against the person or property assessed."
>
> *Compiled Laws of New Mexico, 1884, Sec. 2849.*

The tax list being, in effect, an execution against the property assessed, we are led to consider what may be sold under an execution against a railroad company. The law is so well summarized in a recent work on railroads that it will suffice here to quote it:

> "The franchise of a railroad company and corporate property essential to the enjoyment of the franchise are not subject to sale upon execution unless the legislature authorizes or assents to the transfer. But locomotives, cars and other personal property held by the corporation, if not in actual use in the operation of the road, are held by some authorities to be subject to sale on execution, and there seems to be no reason why the property of a railroad corporation not essential to the enjoyment of its franchise, should not be subject to the payment of its debts."
>
> *2 Elliott on Railroads, Sec. 520 and cases cited,* especially *Gue* vs. *Canal Co., 24 How. 262–3.*

Whatever differences in the decisions of other courts there may be upon this question, as to what may be levied upon under an execution against such corporations, so far as this court is concerned there is no departure from the rule laid down in *24 Howard, 262*, above cited, which is certainly a proper rule, and one which will prevent any such dreadful consequences to this corporation as are conjured up by the too lively imagination of counsel for appellees.

No reason can be assigned for permitting this tax list execution to go beyond the scope of any other execution,

and appellees might just as well protest against the propriety of permitting judgments in ordinary actions against the railroad company. The courts will not permit the dismemberment of the railroad, nor will the Territory be compelled to resort to such mutilation to collect its debts.

East Alabama R. Co. vs. *Doe, 114 U. S. 350.*

It is respectfully submitted that the defenses set up by appellees are not well founded in law; that no sufficient answer has been made to the case of appellant; that the contentions of appellees amount only to a desperate effort to confuse the simple issues involved, and to escape the application to them of clear and well established principles.

F. W. CLANCY,
Counsel for Appellant.

In the

Supreme

Term, [illegible]

United States [illegible] Company
of New [illegible] et al.

APPEAL FROM NEW MEXICO.

F. W. CLARKE,
Solicitor for Appellant.

BYRD, GRIFFIN & WILLIS, PRINTERS, SANTA FE, N. M.

Supreme Court of the United States.

OCTOBER TERM, 1898.

Nos. 106, 169 and 170.

Territory of New Mexico
vs.
United States Trust Company et al. } Appeal from New Mexico.

To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States.

Your petitioner, the Territory of New Mexico, appellant in the above entitled causes, respectfully prays the court to order a re-hearing of said causes for the following reasons:

First. In determining the character of the estate taken by a railroad company under the name of a "right of way," the court has apparently overlooked its earlier, applicable decisions, with which the holding in this case is in irreconcilable conflict.

Second. The court appears not to have considered the argument that in 1866, when the act of Congress was passed, and for years thereafter, no such meaning had ever been given to the phrase "right of way," as is now claimed for it.

Third. The application to this case of the common law rule that whatever is affixed to the soil becomes a part thereof, is essential to the decision of the court; but this proposition has not been discussed by counsel for appellant on the oral argument or in the briefs, and there is a large number of adjudications bearing on this question adverse to the conclusion of the court, to which the attention of the court has not been called and which the court evidently has

not considered, so that upon a rehearing it is quite possible that the court would find the weight of authority and reasoning so strongly against the application of that rule to such fixtures as are in question herein, as to lead to a different result.

Fourth. The court has failed to notice a material difference between cases Nos. 106 and 170, which relate to taxes in Bernalillo County, and case No. 169, which relates to taxes in Valencia County, the difference being that in Valencia County only a little over one-third of the railroad runs over what was public domain at the time the act of Congress was passed, and only that portion can be considered as exempt under Section 2 of the act, separate assessments having been made of these different portions, as will be seen by reference to pages 80 to 84 of the record.

And your petitioner respectfully submits herewith, as part hereof, the accompanying statement, more in detail, of the foregoing grounds for a rehearing.

TERRITORY OF NEW MEXICO.
By F. W. CLANCY,
Solicitor for Appellant.

I hereby certify that I have examined the record and decision of the court in these cases and am of opinion that this application for a rehearing is well-founded, and should be granted.

F. W. CLANCY,
Counsel.

STATEMENT OF REASONS FOR A REHEARING.

The rules of the court permit applications for rehearing, but the practice of making such applications is not one in which counsel should often indulge. The invitation extended by the rules is, of course, based upon the possibility of error in the conclusions of the court, and its desire, so far as is possible in any finite institution, to eliminate such error. As a rule counsel should not, however, after once having had an opportunity to present their case, ask for rehearing unless they are quite certain that the decision of the court is wrong, and believe that the court has not had its attention drawn to matters the consideration of which would, or might, lead to a different result; but having such certainty and belief, it is a duty to the court, as well as to clients, to make a presentation of their views. It is proper to say this, in order that the court may understand the spirit in which this application is made in these cases, the success of which will depend only upon the ability of counsel. If the reasons which exist for a rehearing can be fully and clearly set forth, it will be allowed, while failure will indicate merely incapacity so to state the law as to bring it fully before the court. The lack will be in the man, not in the cause.

It is not intended herein to reargue the case under the guise of a request for a rehearing, but to confine this argument to its legitimate scope. To do this it will be well first to set out what the court has decided.

The opinion of the court may be fairly condensed as follows:

> 1. Congress, in granting a right of way to the Atlantic and Pacific railroad company, in 1866, intended to give, not a mere easement as the phrase would ordi-

narily imply, but either an estate in fee simple or surely more than an ordinary easement, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal property; and this because what was granted is exactly measured as a physical thing and because the possession of the railroad company must be practically exclusive.

2. The interest granted being real estate of corporeal quality, the common law rule that whatever is erected upon realty becomes a part of it, is applicable, and therefore the property sought to be taxed in this case must be considered a part of the "right of way" and consequently exempt from taxation under the letter of the statute.

In addition to this the court is careful to say, however, that it does not intend to depart from the rule of construction heretofore laid down by this court in former cases, and that that rule is not impaired by the present decision which "simply rests on the terms of the statute."

The former decisions of the court in this class of cases establish, as governing rules,

That "exemptions from taxation are to be strictly construed;"

That "when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power" to tax;

That "there must be no doubt or ambiguity in the language used upon which the claim to exemption is founded;"

That "no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power;"

That "the existence of a well founded doubt is equivalent to a denial of the claim."

It being understood that in these rules are to be found our guides as to the construction of statutes containing exemptions from taxation, it is obvious that all which the appellant in the present cases needs to do, is to show that the language of the act of Congress "admits of reasonable con-

tention," or to demonstrate "the existence of a well founded doubt" as to the correctness of either of the positions taken by the court in its opinion. If it shall appear to the court from the present application that there is any chance, upon a rehearing, of appellant's being able to show the existence of a well founded doubt, or that the language of Congress admits of reasonable contention, it is clear that the opportunity should be given for it to do so.

I.

In determining the meaning of the phrase "right of way" as applied to railroads, the court appears to have overlooked its own earlier, applicable decisions.

The section of the act of Congress as to which this controversy arises is as follows:

> Sec. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific railroad company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States.

It will be seen that the act of Congress grants a right of way through the public lands, to the extent of 100 feet in width on each side of the road, and this right of way is granted "for the construction of a railroad and telegraph as proposed." There is no reason for applying to the words of conveyance in the act of Congress, for the purpose of sustaining a claim of exemption from taxation,—a purpose contrary to the settled policy of this court,—any different or other rule of construction from that which is applicable to words of conveyance in a deed. There are numerous cases which have been adjudicated in the courts of this country where deeds of the most absolute and complete character, so far as their language is concerned, have been declared to convey to railroad companies mere easements when the land conveyed was for the purpose of building a railroad. One of

The most noteworthy of these cases is one decided by this court and reported in 114 U. S. It is absolutely beyond the power of human ingenuity to reconcile the decision of this court in that case with its opinion in the present case. All of the reasons urged in the present case for holding that Congress in granting the right of way to the railroad company granted an estate in land which was more than a right of way as known to the law in 1866, would apply with equal force to the deeds of conveyance to the Opelika and Oxford railroad company. A railroad company in Alabama was for the purpose of constructing a railroad of the same character and nature as a railroad anywhere else, for the purpose of carrying on the same kind of business, and with similar rights and powers: it would, so far as its right of way is concerned, quite as much as the Atlantic & Pacific railroad company, have a right to exclusive use and possession, and its right would be perpetual, attributes to which this court in the present case gives great importance in determining the meaning of the phrase "right of way." And the right of way conveyed to the Alabama company was "exactly measured as a physical thing, not as an abstract right," just as this court now says of the grant to the Atlantic & Pacific company. The precise point was urged upon the court by counsel in the earlier case and was distinctly and emphatically passed upon. The court used the following clear and unmistakable language:

> "The right granted was merely a right of way for a railroad. It was granted to an existing corporation which had a franchise. The grant to the 'assigns' of the corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words "forever in fee simple" enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law or separate from the franchise to make and

> own and run a railroad . The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired is merely an easement on the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor."
>
> *East Alabama R. Co. vs. Doe, 114 U. S., 350.*

In the case just cited, reference to the brief of counsel for defendant in error will show that the question was directly raised and necessarily involved as to whether the railroad company took anything more than an easement under the deeds which by their language appeared to convey so much. The attention of the court is invited to a comparison of the language of the deeds, and of the act of Congress. In the Alabama case the court says all that the company acquired was "merely an easement on the land;" while in the present cases, it says that surely more than an easement, if not the fee itself, was granted.

Both decisions cannot be right, and it is respectfully submitted that the court should adhere to what has been the unchallenged ruling of the court for nearly fourteen years.

There is another and still earlier case decided by this court, to which no reference is made in the opinion, which is quite as difficult of reconcilement with the present decision as is the case of the *Railway Company vs. Doe*. In that case the court had under consideration "the proper construction of the act of June 8, 1872, 17 Stat. at L. 339." That act granted to the railroad company,

> "The right of way over the public domain, one hundred feet in width, on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops and other buildings for railroad purposes, and for yard room and side tracks not exceeding 20 acres at any one station, and not more than one station in every ten miles, and the right to take, from the public lands adjacent thereto, stone, timber, earth, water and other material required for

> the construction and repair of its railway and telegraph line."

It will be seen that this right of way was granted in substantially the same terms as the grant to the Atlantic & Pacific railroad company. Now as to the proper construction of this act this court, speaking through Mr. Justice Harlan, said:

> "That act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and branches. In this view, and having due regard to all the circumstances and condition of the company, when the act was passed, we do not doubt that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the charter of the company, and the act of Congress."
>
> *R. R. Co. vs. Alling, 99 U. S. 475.*

It is certainly difficult to understand how Congress could have two such entirely different intentions, in 1872 and 1866, as this court ascribes to it by its opinion in the above cited case of *Railroad Company vs. Alling* and in the present case, when the language is substantially the same in the two different acts. If Congress, as this court decided, by the act of 1872 intended "to grant to the company a present *beneficial easement*," by what mode of reasoning ought we to impute to Congress an entirely different intention in the earlier act of 1866?

In this connection attention is called to the views of Mr. Justice Brewer, expressed before he became a member of this court, when he declared, with regard to condemnation proceedings, that,

> "Unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use. The record of these proceedings is not entirely clear, but I think the

> fair construction to put upon it is that the railroad was seeking to take no more than was needed, and that was the easement—the use."
>
> *Keener vs. U. P. R. R., 31 Fed., 128.*

Certainly these views are not in harmony with the reasoning of the court in the present case as to the nature and character of railroad business forcing the conclusion that more than an easement is needed for a railroad. They are the views which a lawyer would naturally entertain, while the opinion of the court here is an innovation upon long-established ideas, and with the result of sustaining a claim of exemption from taxation, a result which this court has heretofore sought in every possible way to avoid.

May there not be here some "well-founded doubt" which this court says "is equivalent to a denial of the claim?" Is it not true that "the language used admits of reasonable contention?" Is there not in the decision of the court something like the indulgence of a mere "implication" which leads to "construing the language used as giving the claim for exemption where such claim is not founded upon the plain and clearly expressed intention of the taxing power?" For if Congress had intended to exempt the railroad and telegraph line from taxation, could it not, and would it not, in terms have clearly expressed that intention, without leaving it to be evolved by implication and by attributing a new meaning to an old and well-understood term of the common law?

Undoubtedly a conveyance of the railroad of the Atlantic & Pacific railroad company, would carry with it the road-bed, ties, rails, bridges, culverts and everything of that sort, and also the "right of way;" but it cannot be said logically that the "right of way" must include the railroad and all the other things. The right of way is a part of the railroad, but the railroad is not a part of the right of way. This statement seems sufficiently self-evident; but the court has held in substance that a railroad and telegraph

line are mere additions to, and therefore a part of, the "right of way" of the company.

Now, if this ruling is to stand, we will be introduced to this sort of controversy: The right of way includes the railroad; exemption of the right of wayfrom taxation exempts the railroad from taxation; exemption of the railroad from taxation includes everything necessary to the operation of the railroad, and numerous authorities can be found to support this view and to extend the exemption of a railroad from taxation to everything necessarily used in connection therewith, and in many cases even to those things which are merely convenient to the use of the railroad.

II.

In determining the meaning of the phrase "right of way" as applied to railroads, the court is at variance with the great mass of authority in the United States.

A few of the decisions on this point were cited in the brief for appellant heretofore filed in this case, and attention is now again called to them, and, somewhat in detail, to a few others out of the great number which can be found in the reports of the various states.

In Michigan the court had under consideration a deed of which the granting clause was as follows:

> "All that certain piece or parcel of land situate, * * * and described as follows, to-wit: The right of way for a railroad running from the marl bed of said cement company to their works, on the west side of Kalamazoo River, and described as follows: 'A strip of land forty feet wide; * * * and being nine hundred fifty-two feet in length."

It is further stated in the opinion that the deed was "in the usual form of a full covenant warranty;" and the court speaks as follows:

> "We think the court below was correct in holding that the deed conveyed an easement only, and not a fee. It does not purport to convey a strip of land forty feet wide, etc., but the right of way over a strip forty feet wide. Cases undoubtedly can be found in which the operative words of the grant relate to the land itself, but such construction cannot be given to this deed. Where the land is first conveyed and then a provision afterwards inserted showing what the land is to be used for it is held in many cases that the fee is conveyed and the clause providing for what the land is to be used is a condition subsequent; but this deed is not open to that construction. It is clear that an easement only was here intended."

Jones vs. Van Buchove, 61 N. W., 343.

No distinction favorable to the decision of this court in the present case, can be made between the words of conveyance in the Michigan deed and the words of conveyance

contained in the act of Congress. If there is any substantial difference the language used in the deed is more strongly indicative of a conveyance of land than is the language in the act of Congress.

That deed conveys, in terms, a right of way "described as" a strip of land 40 feet wide and 952 feet long; while the act of Congress conveys a right of way "to the extent of one hundred feet in width on each side of said railroad."

In Nebraska a deed conveyed to a railroad company, its successors and assigns, for right of way and for operating its railroad only, a strip of land 100 feet wide across certain lands described by government subdivisions, and it was held to convey no title to the land which would enable a successor or assignee of the original grantee to sell and convey a portion of the 100 foot strip to another railroad company for its use, but, on the contrary, that the original deed conveyed only an easement.

Blakely vs. R. R. Co., 64 N. W., 972-3.

There is no substantial difference between this Nebraska deed and the act of Congress under consideration, except that the deed conveys land for certain purposes, while the act conveys a right of way; but it cannot be contended by any one that the right of way granted by Congress was for any other purpose than for the "construction of a railroad and telegraph as proposed."

In Vermont a deed was made conveying "a strip of land four rods in width across my land," and having, at the end of the description, the words "for the use of a plank road," that being apparently the only difference from an ordinary deed of conveyance; and the supreme court of the state held that only an easement was granted and nothing more.

Robinson vs. R. R. Co., 59 Vt. 426.

In Missouri, an act of incorporation of a railroad company authorized the company to "take, hold, use and enjoy the fee simple or other title in and to any real estate." The

company acquired land by condemnation proceedings, over which it built and used a railroad. The owner from whom the land was so acquired, sold and conveyed his land to another, who sued him upon his covenant of seizin, alleging that the company owned the land in fee simple which it had condemned, and which was a part of the land conveyed. The opinion sets out that the statute authorized condemnation proceedings which would result in a judgment in favor of the owner against the company, for the damages assessed, and "an order vesting in the company the fee simple title to the land;" and it appears that such a title had been acquired by such proceedings. The court held, however, that only an easement had been acquired, that the use only had been taken, and that there had been no breach of the covenant of seizin.

Kellogg v. Malin, 50 Mo. 499.

"By the statutes of this state, railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such lands is vested in the company, its successors and assigns. The difference between the perpetual use of land, and the fee to it is only nominal. The interest a railroad company acquires in land in this state for a right of way, while only an easement, may be permanent in its nature, and may be practically exclusive. The value of the remaining fee, burdened by such an easement of perpetual use, is only nominal. *(22 Minn. 286; 68 N. Y. 591; 122 Mass. 110.)* The statute seems to recognize this because it requires the commissioners to assess the value of the land taken."

Pilcher vs R. R. Co., 38 Kan. 522.

"The line of railway operated by appellant was constructed more than thirty years since over the lands of G. W. Telford, and has been continually operated. Very recently the railway company has put in a side track over the same land, and within thirty feet of the main track. The executors of Telford, in whom is vested the legal title, bring this action as for an additional appropriation. The company defends upon the ground that this additional track has been put upon their own right of way. No conveyance was ever made by Telford of any right of way, and no condemnation had. The railway company claims a right of way of one hundred feet on each side of the center of the track under the provisions of section 23 of their charter, which is in these words: 'In the absence of any contract with the said company in relation to land through which the said road may pass, signed by the owner thereof, or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of said road, and no longer, unless the person owning said land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them, shall apply for an assessment for the value of said land, as hereinbefore directed, within five years next after that part of said road was finished; and in case the said owners, or those claiming under them, shall not apply for such assessment within five years next after the said part was finished, they shall be forever barred from recovering the said land or having any assessment or compensation therefor, etc.

* * * * *

"We are of opinion that the grant presumed to have been made by Telford was a grant not of the fee, but of an easement. The doctrine of eminent domain rests upon the presumed necessity for the taking of private property for public use. The taking, to be consistent with this theory, must therefore ordinarily be limited to the apparent necessities of the public. Statutes authorizing a taking of private lands for railway purposes generally limit the taking to an easement, leav-

ing the fee in the owner. When the statute does not clearly authorize the condemnation of the fee the easement alone should be condemned. This charter method of condemnation does not expressly condemn the fee and we think the 'grant' presumed and the 'title' acquired is a grant of an easement and the title to the easement and nothing more. *Cooley Con. Lim (5th Ed.), 691; Washington Cemetery Co. vs. Railway Co., 68 N. Y., 594; Lewis Em. Domain, Section 278.*"

Railway Co. vs. Telford, 89 Tenn., 295, 297, 298.

"The interest, or estate, which a railroad corporation acquires in land taken by it for railroad purposes by condemnation is, and from the nature of the uses must be, a right to the occupation of it, exclusive in point of user, and practically unlimited in point of duration. This right, while for many purposes it is substantially equivalent to the fee, is not the fee."

Fitch vs R. R. Co., 59 Conn., 419-20.

One of the reasons given by the court for holding that the "right of way" granted is not an easement, is the applicability of ejectment to the recovery of possession of the "right of way;" but such applicability may be admitted without affecting appellant's position.

The true reason for holding that the interest of a railway company in its right of way is such as to support an action of ejectment, is not to be found in the idea that its estate partakes of the nature of an estate in fee simple, but because, while only an easement in the strict sense of the

word, yet it is such an easement as entitles the company to practically exclusive possession of the land over which it has the right of way, and ejectment is only a possessory action. This is abundantly established by authority, in cases where the courts have been careful to adhere to the proper meaning of the term "right of way," while showing the difference between this kind of easement and others as to the right of possession. A few quotations from authorities will show this beyond question.

"It is objected in the next place, that plaintiff has not sufficient property in the real estate to maintain ejectment; that plaintiff has only an easement, and no title to the soil; and that ejectment will not lie for the recovery of an easement.

"It is true that ejectment will not lie, as a general rule, for an easement, or to be let into the use and occupation of a servitude. The reason is that the party complaining has only a right in common with the public, or with some other person or persons, to the use or occupation claimed. The right is a qualified, limited one, and, in ordinary cases, is not disturbed by another's simple occupation. It is but a privilege to go on the lands of another for a specified, limited purpose and has no element of exclusiveness in it. A right of way, or common, may be given as illustrations of this principle. *Washb. on Easements (3d Ed.), 3, 260-270; Child vs. Chappell, 9 N. Y., 246; Morgan vs. Boyle, 65 Maine, 124; Rees vs. Lawless, 12 Amer. Dec. 295.* There are cases which go beyond this doctrine. *Wood vs. Truckee Turnpike Co., 24 Cal., 474; Union Canal Co. vs. Young, 30 Amer. Dec. 212; 2 Wait's Ac. & Def., 247; 2 Redf., R'w'y, 553.*

"Lands claimed and condemned as road bed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired, not the right of use to be enjoyed in common with the public, or with other persons. The right and

use are exclusive, and no one else has any right of way thereon. *M. & O. R. Co. vs. Williams, 53 Ala., 595; M. & M. R'w'y Co. vs. Blakely, 59 Ala., 471; Tanner vs. L. & N. R. R. Co., 60Ala., 621; S. & N. R. R. Co. vs. Pilgreen, 62 Ala., 305; Cook vs. Cen. R. R. & Banking Co., 67 Ala., 533; R. & G. R. R. Co. vs. Davis, 2 Dev. & Bat. (Law), 451; Jackson vs. R. & B. R. R. Co., 25 Vt., 150; T. & B. R. R. Co. vs. Potter, 42 Vt., 265.*

"Ejectment was originally classed as a possessory action. Hence it was that at common law any number of causes could be maintained, by laying the demands at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession, in fact legal as distinct from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterwards found in possession unless the latter can show a paramount title, or a possession continuous, peaceable and adverse, of sufficient duration to toll the entry. *Tyler on Ejectment, 70; Ib. 165; Anderson vs. Mealer, 56 Ala., 621.* The lessee or termor, during the continuance of a valid lease, may maintain the action against the lessor, although the owner of the entire fee less the term. So, the title of a railroad corporation to the possession of the soil covered by the road bed and right of way will, after condemnation, dominate all adverse claim of possession, even by the owner of the fee. "Although the right which a railroad company acquires to land taken under their charter, is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety require that the possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used." *Conn. & Pass. River R. R. Co. vs. Holton, 32 Vt., 43."*

T. & C. R. R. Co. vs. E. A. R. W. Co., 55 Ala., 523-4.

The same case having again come before the supreme court of Alabama, the court took occasion to say:

"Right of way for a railroad is an easement—an interest in the freehold—which can only exist in grant or by prescription."

E. A. R. W. Co. vs. T. & C. R. R. Co., 78 Ala., 281-2.

"We think it clear that the plaintiff, under his grant, has a right of entry upon and possession of the land in question, and that this right of possession is necessarily an exclusive right, as against all certainly besides the United States, and gives the plaintiff such a legal interest in the land as enables it to maintain an action like the present, to recover the possession from one who has wrongfully entered thereon. The obstacles to this suit, such as they are, are entirely technical. If the plaintiff is entitled to actual possession of the land, for the purpose of effecting the object in view when the right of way was granted, it can recover such possession in some judicial proceedings. The mere form of the action has ceased to be of any importance in this court.

"There is now but one form for all the common law actions. In every action the complaint contains a statement of the facts of the case, and is held sufficient, if the facts stated entitle the plaintiff to the relief demanded. We think this complaint does state a good case. It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy. But in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot or other superstructure is placed, and we think the same is true of the whole two hundred feet on each side of the track. The grant is a right of way to the extent of two hundred feet on each side of the track, and the plaintiff is entitled to possess and use the whole quantity."

Central Pac. R. R. Co. vs. Benity, 5 Fed. Cas., 363.

In Vermont it was settled at an early day that railroad

companies took no fee to the land occupied for their purposes, but only an easement—a right of way—although they were, by the statute, to be "seized and possessed of the land."

Quimby vs. R. R. Co., 23 Vt., 393.

And yet it was held that they could maintain trespass, *quare clausum fregit*, against the owner of the fee of the land over which the right of way existed, objection being distinctly made that such action of trespass would not lie for interference with enjoyment of an easement. The court did not attempt to combat the settled doctrine that the railroad had only an easement, but put its decision substantially on the same ground as that now suggested herein —the necessarily practically exclusive possession of the company, which would make applicable to this easement remedies which in earlier times were applicable only to absolute ownership of the land.

The court said:

> "Although the right which a railroad company acquires to land taken under their charter is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety, require that their possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used."

R. R. Co. vs. Holton, 32 Vt., 47.

> "We return, then, to the question: Was this easement capable of transfer? The question seems to be one of first impression. At all events, no case is cited, and we can find none, in which the point has been adjudicated. The subject matter of the question—the right of way for a railroad—is itself new; and the

principles, long ago established in regard to rights of way personal or in gross, and right of way appurtenant to real estate, have no direct application to this new class of rights of way. It, we apprehend, is *sui generis*, and must be governed by reasons peculiar to itself, and the rights which may be derived from the analogies it may bear to the old classes of easements of this kind, whose incidents have been already fixed and determined. It seems to be settled that "if a right of way be in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and is so exclusively personal that the owner of the right cannot take another person in company with him. But when a right of way is appended or annexed to an estate, it may pass by assignment when the land is sold to which it was appurtenant."

R. R. Co. vs. Ruggles, 7 Ohio St., 7-8.

"By the statutes of this state railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such land is vested in the company, its successors and assigns. The difference between the perpetual use of land and the fee to it is only nominal. The interest the railroad company acquires in land in this state for right of way, while only an easement, may be permanent in its nature, and may be practically exclusive. The value of the remaining fee burdened by such an easement of perpetual use is only nominal."

Pilcher vs. R. R. Co., 16 Pac., 948.

Attention is called also to

Williams vs. R. W. Co., 50 Wis., 76.
R. R. Co. vs. McWilliams, 71 Iowa, 164.
Lyon vs. McDonald, 78 Tex., 71.
Lumly vs. R. R. Co., 23 Vt., 387.
R. R. Co. vs. Swivney, 38 Iowa, 182.
Trust Co. vs. R. R. Co., 63 Fed., 613.
Quick vs. Taylor, 113 Ind., 540.
R. W. Co. vs. Geisel, 119 Ind., 77.
Ingalls vs. Byers, 94 Ind., 135-6.

It appears to be quite clear from these authorities that wherever a conveyance of land is limited to any public use such as a railroad, a highway, a toll road, or a public park, the courts will hold that no fee is conveyed but only an easement for the use and benefit of the public. There is nothing to be found in the act of congress which calls for a more expanded meaning for the benefit of a recipient of public bounty which is now seeking to evade its due share of the burdens of taxation.

It is certainly difficult to understand how, in the light of these various decisions it can be asserted that the language of the act of congress does not admit of "reasonable contention" or that there is no "well-founded doubt," which this court has declared will be fatal to any claim of exemption from taxation.

III.

Up to 1866, and for many years thereafter, right of way was never used to mean anything more than an easement.

This is a negative proposition, and the burden of proof is naturally on those who combat it. No such proof has been adduced, and it is here confidently asserted that none can be found. What we are seeking is the intent and meaning of congress, and we must not impute to congress any meaning of its language different from that which prevailed at the time of the enactment under consideration.

Endlich on Statutes, sections 85, 357.

As tending to throw some light on this subject, an examination has been made of early debates in congress in which that section of the Northern Pacific charter which is in the same language as section 2 of the Atlantic & Pacific act—hereinbefore quoted—was under discussion, and some notes of the results are herewith presented.

It is not intended to claim, or supposed, that such things can be allowed to control the meaning of a statute, nor is it forgotten that courts will not ordinarily resort to evidence *aliunde* as to the legislative intent; but it is desired to call the attention of the court to the fact that many times a statute containing this same exemption from taxation was under consideration in both houses of congress, and was the subject of extended debate and careful scrutiny by some of the most eminent lawyers of their day; but none of them discovered any such meaning to this exemption from taxation as is now suggested, although an examination of the debates will make it clear that attention would have been called to it if any such meaning had been dreamed of in

those times. This is but a negative proof, but coupled with the reputation and ability of the men who were critically examining this statute, it may go far toward inducing the court to believe that there may be a "well-founded doubt," and that the language used admits at least of "reasonable contention." What was said by such men—men of eminence, skill, experience and great reputation both as lawyers and as statesmen—may properly be submitted to the court just as opinions of courts or of authors of repute are cited. Attention is particularly called to the remarks of Senator Thurman.

On February 28th, 1870, as will appear by reference to the Congressional Globe, part 2, second session, 41st Congress, at pages 1584-5-6, the senate had under discussion Joint Resolution No. 121, authorizing the Northern Pacific railroad company to mortgage its lands, and providing for indemnity lands in lieu of land which had been located within the limits of its grant, and Senator Pomeroy, after having stated that he was on the committee on public lands in 1864, when the charter was granted and the whole subject canvassed in committee, said:

> "In 1864 it was claimed that congress having passed a Pacific railroad bill in which it granted both lands and bonds, here was an enterprise, the Northern Pacific railway, that could be built upon lands alone. * * * It was distinctly understood and agreed that this road should be constructed, as perhaps no other ever was, and I do not know that one ever can be, upon the stock of the company with a land grant large and certain."

Not a word was said about the valuable exemption from taxation.

At a later day in the same session, March 2, 1870, at pages 1624 to 1627 of the same book, the discussion was resumed. The resolution was strongly opposed as to the clause giving indemnity lands, especially by Senator Casserly, who, at great length, expatiated upon the enormous land grant which had been given, but never hinted at the conferring of an exemption of the railroad and telegraph line from all taxation in the territories. Examination of this debate will convince any reader that if any such valuable immunity as is now claimed for the Atlantic & Pacific company had ever been intended, it would not have escaped the attention of the senators interested who were engaged in making the strongest possible showing of what had been given the company as a reason for giving it no more, and it is to be borne in mind that at that time there were still in the senate many senators who had been there when the Northern Pacific act of 1864 and the Atlantic & Pacific act of 1866, were passed.

This debate was renewed April 7, 1870, and continued at great length as will appear by reference to pages 2480 to 2486 and 2491 to 2495 of the same book, but in the whole discussion no statement is made by any one to indicate that the railroad and telegraph lines were to be free from taxation in the territories of the United States. On the contrary it was in substance declared more than once, that the railroad company received "from the government aid only in the form of lands lying in alternate sections." (P. 2492.)

On the 9th of April, 1870, p. 2539 of the same book, this resolution was again taken up and the discussion continued to page 2547. On page 2539 appear remarks by Senator Harlan, who said, referring to certain railroads in Minnesota:

> "The grant of those roads is but five sections to the mile on each side of the road, being ten to the mile only. Now, if those companies having in hand the construction of their lines of road across the state of Minnesota are able to build them with a subsidy in

> lands of ten sections to the mile, can it be pretended that this company cannot construct that part of their road which lies in the state of Minnesota with just double that amount, which they now have under the existing law?"

If the honorable senator who was making this argument had imagined that the company had any such valuable exemption from taxation as is now contended for, he would certainly have urged the existence of such a grant as additional evidence of the ability of the company to build the road without further concessions.

At page 2546 Senator Howard said:

> "As I said before, this company have never received a dollar in the form of subsidy from the United States. They are to rely upon their own private means and upon the public lands which we gave them to raise the money to carry on this vast enterprise."

At page 2540 Senator Harlan said:

> "But, sir, the applicants for this increased subsidy do not understand these lands to be worthless. They are doubtless men of intelligence. They have read what has been written and published with reference to the topography of this part of our country. They know that on account of the reasons to which I have referred, as well as on account of the great depression in the mountain ranges west of the lakes, giving free access to the humid atmosphere from the Pacific ocean, this whole line of country is a fruitful country; that it produces grass and timber up to the very foot of the Rocky mountains, and through all of the valleys of the various mountain ranges, until you approach within a few hundred miles of the Pacific coast where the whole country is densely covered with immense forests. It is not a desert, therefore. If any one will take the trouble to read the report of Governor Stevens of his exploration of this proposed line of road, he will ascertain that from actual observation and personal inspection it is found to be a fertile country. This being so, it becomes manifest, as it seems to me, that the quantity of land already granted is sufficient inducement to enable the company, if they can be induced by a grant of land, to build this road."

On the 11th of April, 1870, the debate on this resolution was again renewed, beginning at page 2569 of the same book and running to page 2584. In this day's debate Senator Thurman, violently opposed to the resolution, made an extended argument against it and attempted at the beginning of his remarks to enumerate the benefits given to the company by the original act, as to which he spoke as follows:

"Now, Mr. President, let us look at what this company is, and what has already been done for it. It was chartered on the second of July, 1864, nearly six years ago. By its charter there was granted to it throughout the greater part of its route, throughout the territories of the United States, every alternate section in a breadth of eighty miles, being forty alternate sections to the mile. These forty alternate sections to the mile make twenty-five thousand, six hundred acres, to the mile; and these twenty-five thousand, six hundred acres, at the government price of $1.25 an acre, will come to a subsidy of $32,000 per mile.

"But this is not all. In addition to this subsidy, equal to to $32,000 per mile at the government price of land, there is given to this road the right of way, and no ordinary right of way of fifty or seventy-five feet in width, but a right of way four hundred feet in width, throughout the entire length of the line and the length of its branches. In addition to this right of way there is given to it absolutely all the land it may need for work shops, depots, water stations, or any of the other structures necessary to the road, although they may be outside of the right of way of four hundred feet.

"Again, sir, the right is given to this company to take from the lands of the United States, wherever situate, all the materials it may need for the construction of the road, whether they be wood or stone, or iron, or gravel, or what not. The right to take all material it may need or can find anywhere upon the public lands is given to this company absolutely as a free gift.

"That is not all. Of the alternate sections that are given to it there are no exceptions on account of either coal or iron. While mineral sections are excluded from the grant in terms, it is also provided that the term

> "mineral section" shall not apply to sections containing iron ore or coal; so that the most valuable iron ores near Lake Superior, the most valuable iron ores that may be found on the route in the western part of the line, may all belong to this company, as well as the most valuable coal mines."

By comparing his language with the section containing the exemption from taxation, it is evident that the senator had that section under his eye while speaking, and yet, in the enumeration of the benefits conferred, he considered the exemption so insignificant as not to be worthy of mention. It cannot be believed for a moment that, if the construction now given to this exemption had ever been dreamed of in 1870—if such a meaning as is now imputed to the language of Congress had ever been heard of by any one in or out of the legal profession—the trained eye of such a lawyer as Mr. Thurman would have overlooked it at a time when he was exerting all of his great powers in an exhaustive argument where he sought to show to the fullest extent the enormous donations and benefits which Congress had conferred upon the company. In scanning the language of this section, he did not consider this exemption of any consequence whatever; and yet for the purposes of his argument on that occasion, an exemption from taxation of the whole of the railroad and telegraph line through the territories of the United States—and at that time almost all of the Northern Pacific railroad was projected to run through the territories, nearly two thousand miles—would have been of immense importance and would have greatly strengthened his statement of the grants made to the company. Moreover, he recurs to this subject of the right of way two or three times in his speech, but fails to discover this wonderful exemption. The conclusion is irresistible that up to 1870 no one had ever heard of the greatly expanded meaning of the term "right of way" which makes it synonymous with the land itself over which the right is to be exercised. If such a meaning was at that time un-

known, it certainly does violence to every applicable rule of statutory construction, now to say that Congress intended something which no one had ever heard of at the time the act was passed.

The discussion of this resolution was resumed in the senate on April 20, 1870, as appears in part 4 of the Congressional Globe at pages 2833 to 2844 and pages 2867 to 2869, when the resolution was finally passed. Then the resolution went to the house, where it was up for discussion on four different days as will appear by reference to pages 3263 to 3271, 3343 to 3348, 3365 to 3368 and 3786 to 3798. It is true that on two of these days the proceedings were almost entirely of a filibustering character for the purpose of compelling opportunity for debate and the offering of amendments, and in this the minority was successful; but no one in the house any more than in the senate, discovered anything remarkable in the exemption from taxation.

The speech of Mr. Casserly on this resolution, made in the senate on the 20th of April, 1870, is printed in the Appendix to the Congressional Globe for the second session of the 41st Congress, beginning at page 303, and near the beginning he says:

> "Senators are now well informed as to the nature of the work to be undertaken by the Northern Pacific railroad company. Senators know—they cannot pretend any ignorance—that for the length of it, it is the easiest road to build in the whole world of railroads. Compared with any other great railway, there is upon its line less heavy work, there are fewer broad rivers to be bridged, fewer high summits to be overcome, fewer wide valleys or deep chasms to be spanned or filled. Beyond this, and much more than this, its route lies through a finer and more fertile country, taken altogether, than is traversed by any other railroad line of anything like the same length in the United States or on the globe. All this is well understood. No one pretends to doubt it. In all this debate no question has been made of it by any friend of this measure."

In his elaborate speech, covering almost seven and a half pages of the Globe, the learned senator fails to discover, in

his attack upon the system of great gratuities conferred upon railroad companies, this vicious exemption from taxation, an exemption so broad, so evil, so far-reaching, that had it really existed in the statute, such a man as this senator would certainly have discovered it.

In a speech of Mr. Stiles, of Pennsylvania, made on the 25th of May, 1870, which is printed at page 609 of the appendix, the speaker, much like Senator Thurman, carefully enumerates the grants made to the Northern Pacific railroad company, dwelling especially upon the things set out in the second section of the act, and particularly emphasizing the great value of the gift of free right of way, but he fails to discover in that section this remarkable exemption from taxation, although he was evidently looking for everything which had been given to the company.

At page 391 of the same appendix will be found an extract from the report of the directors of the Northern Pacific company setting forth the valuable possessions of the company which would easily enable it to build the railroad, but they fail to mention this important item of exemption from taxation, because at that time no one had ever thought of such a thing.

In the 39th Congress an effort was made to get the government to guaranty the interest at six per cent upon the stock of the Northern Pacific railroad company and the measure was discussed in the house of representatives on the 24th, 25th, 26th and 27th of April, 1866, as will be seen by reference to the Congressional Globe at pages 2159 to 2161, 2182 to 2191, 2203 to 2215 and 2235 to 2246, when the bill was finally defeated by a vote of 76 to 56.

In the course of this debate, page 2208, Mr. Donnelly, of Minnesota, said:

> "Now we have had presented here by the opponents of this bill, quotation after quotation from pamphlets and from speeches to show that the land grant already made to the company is of such enormous value that it alone ought to enable the company to build the road; that in any event it is of such great value that when the road shall have been constructed the land adjacent to it and already granted to the company will be equal in value to the total cost of the road itself."

And, a little later, he quotes from a letter of the Honorable John Wilson, third auditor of the treasury department, as follows:

> "I have not the figures nor would I now be able to work them up if I had, but comparing this with the Illinois Central railroad grant, I think it a small estimate to say that if this grant is properly managed, it will build the entire road, connecting with the present terminus of the Grand Trunk, through to Puget Sound and head of navigation on the Columbia; fit out an entire fleet for the China, East India and coasting trade, of sailing vessels and steamers, and leave a surplus that will roll up to millions."

This had already been quoted by other gentlemen. Everybody agreed as to the enormous value of the land grant.

At page 2213, Mr. Washburne, of Illinois, inveighs with great earnestness against the third section of the proposed bill which would have exempted the lands granted to the railroad company from all taxation until after two years from the date of their conveyance by the company, and pointed out the monstrous injustice to the people of the territories, who, as he declared, "should have the right to tax all the lands to support their government, maintain their schools, build their public buildings, roads, etc." Manifestly, with all his opposition to this company and to the great grants which had been made to it, he had never discovered the exemption from taxation now contended for,

had never dreamed of such a construction, or he would have proclaimed it with all the great vigor which he possessed.

At the same session of Congress, in the senate, a bill was introduced which appears to have been the same, or substantially the same, as the one which had been defeated in the house. Debate on this bill began July 14, 1866, page 3807 of Congressional Globe. The committee reported various amendments, one of which was an exemption from taxation of the lands of the company for five years after the issuing of patents for the same, the bill having previously provided for exemption from taxation until the lands should be sold and conveyed by the company. Mr. Sherman violently opposed this bill. The discussion was resumed July 16, 1866, pages 3830 to 3838. On pages 3831-2, Mr, Sherman clearly sets out the two railroad propositions of the Union and Northern Pacific, sharply defined, as they were before Congress in 1864, and plainly shows that no such considerations existed at that time as have been urged on behalf of appellants in the present case. While expressing his strong conviction that the road could be built upon the land grant alone, he never refers to the exemption from taxation of the right of way as one of the inducements to investors. This bill was also opposed by Senator Fessenden at great length. Its discussion was resumed July 17, 1866, at page 3866 of part 5, Congressional Globe, First Session, 39th Congress, and on motion of Mr. Sherman, page 3867, referred to the committee on the Pacific railroads, which had the effect of carrying it over the session. The bill was reported by the committee, July 24, 1866, page 4064, with amendments materially reducing the aid proposed to be given to the company, and was then post-

poned until the next session of Congress. It does not appear, however, to have been revived or called up at the next session.

Upon the discussion of a joint resolution extending the time for the building of the Northern Pacific railroad, in the senate, May 30, 1868, at page 2689 of part three of the Congressional Globe, Second Session, Fortieth Congress, it is stated several times in substance that the only aid the railroad company had been granted was the land grant.

In a memorial of the Northern Pacific railroad company, printed as H. R. Misc. Doc. No. 272, Forty-third Cong. First Session, at page 2, it is declared that "The only aid given to the road by the government was land."

The most cursory examination of these lengthy debates in Congress cannot fail to convince the reader that such meaning of "right of way" as would make that phrase synonymous with the land itself, or such a construction of the statute as would extend the exemption of the "right of way" from taxation, to an exemption of the whole railroad and telegraph line, had never been contemplated by any

one. No one discovered it; no one mentioned it; no one ever hinted at it; although the close, eager, zealous, critical attention of many of the keenest minds and best trained intellects our country has ever produced, was, for long periods of time, fixed, not only upon a statute containing this provision, but even on the very section which declares the exemption.

IV.

The common law rule that whatever is affixed to the soil becomes a part thereof, cannot properly be applied to the present case.

If it be admitted, *arguendo,* that the court is correct in its first position, that Congress granted either an estate in fee simple in the two hundred foot strip, the use of which for a right of way it gave through the public domain, or at least more than an ordinary easement and something of a corporeal nature, appellant still insists that the common law rule, that things affixed to the soil become a part thereof, can have no proper application to this case. This proposition was not discussed by counsel for appellant either on the oral argument or in his printed briefs, and it is now clear that this was a mistake on his part. It can only be said in excuse that he was so misled in his views of the case as to attach but little importance to this question which the opinion of the court has shown to be really decisive of the case. A rehearing might well be granted upon the ground alone that such a vital question had not heretofore been argued.

A.

As to this point this is a case of the first impression in this Court.

It should be understood at the outset that so far as the application of this rule of the common law is concerned, the present case is the first of its kind in this court, that it is entirely new in this ~~form~~ *forum*, that there is nothing in the earlier decisions of this court on this point which will serve as a guide in the peculiar circumstances of this case. Therefore, if there is any doubt, certainly the benefit thereof must be given to the taxing power. The question has arisen in but two jurisdictions heretofore, once in Montana and twice in Arizona, with directly opposite results.

N. P. Co., vs. Carland, 5 Mont., 146.

A. & P. Co., vs. Lesueur, 19 Pac., 157.
A. & P. Co., vs. Yavapai, 21 Pac., 768.

It is not meant that this court has never been called upon to consider whether rails, ties and bridges do not become a part of a railroad to which they are affixed, or would not pass under a mortgage or conveyance of the railroad; but that it has never been called upon to consider whether such things become a part of the soil to which they are affixed in a controversy between a sovereign power attempting to exercise its authority to tax, and a railroad company seeking to evade taxation.

The full extent to which this court has gone in the application of the common law rule is clearly set forth as follows:

> "Whatever is the Rule applicable to locomotives and care and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."
>
> *Porter vs. Steel Company, 122 U. S., 283.*

It is obvious that such a decision is based principally upon a consideration of the relations between the parties,

upon their relative positions toward each other, and is not intended to lay down a hard and fast rule applicable to all cases in which the question of rails and other articles affixed to the soil may arise. The most frequent occasion for making exceptions, arises from the differing relations between the parties. To this we will hereinafter recur.

B.

The general condition of the law of fixtures is such that the court should not apply the common law rule to this case.

In the present case the court applies the common law rule that whatever is affixed to the soil belongs to the soil, with all its ancient rigor and strictness. Now before proceeding to the consideration of how far that rule has been relaxed in modern times, attention should be called to the fact which might well be controlling, that when that rule came into existence, and during the greater portion of the time that it has continued, no such things as railroads were known. Nothing even analogous to these public instrumentalities for trade, commerce and transportation, devoted to the use of the public, had been dreamed of. If the application to new conditions of such an artificial rule leads to manifest injustice or absurdity, then the courts will hold it inapplicable. If this is not so, then the claim that the law is a progressive science, adapting itself to new conditions and to the numerous complications ofmodern life, must be abandoned.

Of course it is the intention of Congress which is to govern, and that intention is to be deduced primarily from the language of the statute. The court has taken the view that, from that language alone, we must draw the conclusion that Congress intended, *first*, to grant a corporeal estate in land by the grant of a right of way, *eo nomine; second*, by the grant of an exemption of the right of way from taxation, to extend such exemption to every thing which might be affixed to the land through and over which the right of way is granted, having in mind the rule of the

common law above referred to. Let us first briefly consider the general condition of the law on this subject.

The most fruitful source of the numerous modifications and exceptions to the common law rule as to fixtures, is to be found in the different relations which parties bear to each other. That which is a fixture and a part of the realty as between vendor and vendee, mortgagor and mortgagee, or between heir and executor, would not be a part of the realty under precisely like circumstances of annexation as between landlord and tenant or if it were affixed to the soil for purposes of trade or manufacture and not for the better use of the land as land. Why should not the rule be as liberal in favor of the taxing power of government, struggling for the means of existence, as in favor of a tenant against his landlord?

It has been said, and with undoubted truth, that the law of fixtures is confessedly the most uncertain title in the entire body of American jurisprudence, and that a judge might in any given case decide either way without much danger of having his judgment impeached or of failing to find some authority to support it.

Tyler on Fixtures, 34.

If that is so, may there not be a "well-founded doubt" in the present case?

As was well said by a former reporter of this court in a note to the case of *Minnesota Co. vs. St. Paul Co.*, 2 *Wall.*, "a fixture is one thing between landlord and tenant; a different thing between vendor and vendee; one thing in the economy of trade, another for the purposes of agriculture."

A few quotations will better illustrate the condition of the law to which attention is invited.

> "The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes a part of it, and cannot afterwards be removed except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as it can

be traced in the books, inflexible, and without exception. It was construed more strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. But even exceptions of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade, upon principles of public policy. And to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes."

Tyler on Fixtures, 54-5.

"It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures, and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness; and that is, that no general rule, applicable to all cases, and to all relations of the parties, can be extracted from the authorities.

"There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee. And this distinction is observed in the case between mortgagor and mortgagee, and again modified as between the heir and the executor.

"The fact of actual and permanent annexation of the thing, personal in its nature, to the freehold, was formerly regarded as essential. But this has been found to be unsatisfactory and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test."

"The doctrine of fixtures by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions, made at different periods of time and under a variety of circumstances, and running into numerous complications and conflicting distinctions arising out of the peculiar relation of the parties and the peculiar circumstances of each particular case; so that it has been found extremely difficult to reduce this branch of the law to any consistent and uniform system.

"According to the decisions, an article may be a fixture constituting a part of the realty as between vendor and vendee, which would not, under like circumstances, be such, as between landlord and tenant; so also an article may be such fixture as between heir and executor, which under like circumstances of annexation, would not be such as between tenant for life and the remainderman or reversioner. And also according to the decisions, an article affixed to the premises for purposes merely agricultural may pass by conveyance of the freehold as a fixture, which would not be such fixture under like annexation if erected or affix for purposes of trade or manufacture; and an article attached to the realty may be removable at one period of time as a chattel, which with the same annexation at another period would not be removable because it constituted a part of the realty. In some cases it has been determined, that in order to constitute a fixture the article should be so united by physical annexation to the land or to some substance previously belonging thereto, that it cannot be detached without injury to the property; while in other cases, articles have been determined to be fixtures, and as such to pass by a conveyance of the freehold with but a slight attachment to the realty and in some instances with-

out any actual but by simply a constructive attachment."

Teaff vs. Hewitt, 1 Ohio St., 523-4.

"In the great case of *Elwes vs. Maw, 3 East, 38, 2 Smith. Lead. Cas., 228*, Lord Ellenborough considers the doctrine of fixtures as depending largely in its application upon the relations of the parties,which he divided into three classes: 1. Executor and heir. As between these the common law rule that whatever is affixed to the freehold, becomes a part of it, and passes with it, *quicquid plantatur solo, solo cedit*, is observed in full vigor. In this class fall also mortgagor and mortgagee, vendor and vendee, as to whom the strict rule of the common law is still in force. *Foote vs. Gooch, 96 N. C., 265.* (2) Between executor of tenant for life or in tail, and the remainderman; in which case the right to fixtures is considered more favorable for the executor. (3) Between landlord and tenant; in which case, in favor of trade and to encourage industry, the greatest latitude is allowed, so that all fixtures set up for better enjoyment of trade are retained by the tenant, though this does not include fixtures used for agricultural purposes. Where, however, they are used for mixed purposes of trade and agriculture, they are held to belong to the tenant. *Williams Pers. Prop. 16, note*, and numerous cases cited. The reason of the distinction is pointed out by Pearson, Ch. J., very succinctly in *Moore vs. Valentine, 77 N. C., 188*. When additions are made to the land by the owner, whether vendor, mortgagor or ancestor, the purpose is to enhance the value and to be permanent. With the tenant, the additions are made for a temporary purpose, and not with a view of making them part of the land; hence, for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what had apparently become affixed to the free

hold, if affixed for purposes of trade, and not merely for better enjoyment of the premises."

Overman vs. Sasser, 10 L. R. A., 724.

A case in New Jersey well illustrates the confusion and uncertainty on the general subject of the law of fixtures. Vice-Chancellor Bird, in what appears to be a satisfactory and well-reasoned opinion, holding one way, and the Court of Errors and Appeals, in an equally good opinion, holding the exact opposite.

Ins. Co. vs. Semple, 38 N. J. Eq., 575-6, 583-6.

Certainly as early as the time of Henry VII, the courts began to recognize exceptions to the law respecting annexations to the freehold, a law based on the early idea of the sacred and superior nature of property in land, and from that time forward the courts steadily introduced exceptions so numerous and so extensive as almost to have subverted the rule and these innovations have been sanctioned by courts only upon enlarged principles of public policy.

Tyler on Fixtures, 45-6.

If by a species of judicial legislation the courts of England and America have steadily advanced in the direction

of the relaxation of the ancient rule upon various considerations of public policy, certainly in a case involving the right of taxation, so "essential to the existence of government" as this court has declared it to be, a court ought not to hold that "the deliberate purpose of the state clearly appears" to relinquish that power, when it can do so only by invoking this ancient common law rule which authorities declare to have been almost entirel subverted, especially in a case where the question is one of first impression. As earlier decisions of this court show, the claim of exemption from taxation is so against public policy, that it will never be allowed if there is any way to avoid it.

In view of this condition of the law and in view of the newness of this case, it is difficult to declare that there is no "well-founded doubt" as to the propriety of applying this rule to such a controversy as the present one.

C.

In the courts of many states, the common law rule has been held inapplicable to this particular class of fixtures.

Controversies with regard to whether fixtures become a part of the realty or not, have almost always arisen in cases where it was claimed that a person had expended money or labor upon the property of another knowing that he was doing wrong, in which cases it has been held that he must lose what has been so expended. No such controversy arises in the present case. But, as will be shown, there are many cases where railroad companies wrongfully entering upon the lands of others, have constructed railroads, and the courts have refused to apply the rule so as to make the companies lose what they had expended. If this rule can properly be relaxed for the benefit of wrong-doing, trespassing railroad companies, it is difficult to discover any good reason for its rigid application against the sovereign taxing power and in favor of a corporation seeking to evade its due share of the burden of maintaining the government.

In view of these numerous decisions, made generally in favor of railroad companies, and excepting this class of fixtures from the operation of the common law rule under circumstances which at the common law would certainly have made it applicable, unless this court will declare all of the reasoning in these cases to be unsound and the conclusions reached to be wrong, it cannot logically be said that there is no "well founded doubt" as to the propriety of applying the rule in all its strictness for the benefit of a corporation possessed of an immense amount of property, enjoying the protection of the laws of the country and refusing to bear what would be its natural and just proportion of the burdens of government.

In at least thirteen states, the courts of last resort have refused to apply this rule of the common law to such fixtures as rails, ties, bridges, etc., of railroads. Attention will be called to a portion of these cases.

"The general rule of the common law certainly is, that whatever is affixed and annexed to the soil becomes a part of it and cannot be removed except by him who is entitled to the inheritance. But this rule is by no means inflexible and without exception. Trade fixtures have been held by the earliest cases in which the question arose, to form an exception. No matter how strongly attached to the soil or firmly imbedded in it, they are treated as personal property, and as such subject to removal by the person erecting them. In the leading case of *Elwes vs. Mawe, 3 East, 38*, the earlier and more important decisions upon this subject are very fully reviewed by Lord Ellenborough, and his conclusion from them, that trade fixtures and buildings for trade have always been recognized as an allowed exception to the general rule, has been acquiesced in, without an exception, as correctly stating the law. The distinction which he

makes against fixtures for agricultural purposes has been doubted, and regarded as too nice and technical, but there is no case in which the exception has not been held to apply to trade fixtures. In *Van Ness vs. Pacard, 2 Peters, 37*, the exception is recognized by the supreme court of the United States, Story, J., delivering the opinion, and the doctrine applied to a house, which had been erected as necessary to the business of a dairyman, although it was occupied as the residence of his family and those employed by him. It is also recognized and asserted in *Holmes vs. Tremper*, 20 Johns. 29; *White's Appeal*, 10 Barr, 252, and others there cited.

"Another exception to the general rule is that of structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use, as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder; and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty or is to be treated as personal property. * * *

"We consider the property in dispute in this case as coming within both of these exceptions. The railway of which it formed an important and necessary part, cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary trade and pursuits of a railway company. It certainly was not necessary to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned it is not pretended that it would or could have been used by the appellee as a railway. The conclusion cannot be avoided that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. The railway is certainlyquite as essential to the trade and business of a railway company as a steam engine and the house which may cover it, or any other fixture can be to the miller or the miner. We do not mean to be understood as denying the doctrine laid down in *Farmers' Loan and Trust Co. vs. Hendrickson*, 25 Barbour, 484, and cited with approv-

al in *18 Md., 193*, that the road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property. *Prima facie*, a house with its foundation planted in the soil is real property, yet when it is accessory to trade and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question. As a general rule, it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules of law that govern any other personal property.

"All the surrounding circumstances show that at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant with its money and labor in the reasonable belief that it had a free right of way, and under the license and by the permission of the owner of the soil. It is true that this license was not of such a character as made it irrevocable, or gave the appellant any sufficient standing in a court of equity, to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it, before its revocation, is to be regarded as legal, and not as the act of a trespasser. The road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management and taken up and replaced such rails or other materials as were necessary in its judgment for the repairs and proper condition of the road.

Northern Central R. W. Co. vs. Canton Co. 30 Md. 352-3-4-5.

In an interesting Texas case, the railroad company had entered wrongfully on the land of another, constructed its

railroad which it used continuously for eight years, when one Hays, who had purchased the land, brought suit, in accordance with the Texas practice, in the form of trespass to try title. In this action judgment was rendered against him and he appealed; the supreme court of the state reversed the judment, rendered judgment against the company and awarded a writ of possession.

Hays vs. R. R., 62 Tex., 397.

Thereupon the railroad company instituted condemnation proceedings in which commissioners, appointed for that purpose, assessed the damages at $8,350, of which the sum of $8,250 was the value of the railway track and $100 the value of thirty-three acres of land taken as a right of way. Hays insisted that the first action had adjudicated his right to the land, including the improvements, and the judge of the county court held with him and that he was entitled to the value of all the improvements. The case was then taken to the court of appeals which said:

> "Section 57. We will first notice the plea of *res judicata*. Touching directly upon this subject, the doctrine announced, and the full extent to which it was announced by the supreme court in said case of *Hays vs. R. R. Co.*, 62 Texas, 397, is that "a party in possession of another's land claiming an easement is a trespasser if his claim is without foundation. If, in a suit by the owner of the soil the plaintiff shows title to the land and the defendant to the easement, the plaintiff recovers subject to the right of defendant to enjoy the easement. If the defendant shows no title of this character, the owner of the land dispossesses him altogether." Now, whilst we admit that this rule gave to appellant, owner of the land, the title to the easement or right of way which the appellant was using, appellant being a trespasser, we do not understand that the fixtures, that is, the superstructure placed by appellant upon the land, although placed there without authority, became a part of the land, and that appellant should be dispossessed thereof by said judgment. That was not the question involved in the decision of the case as presented to and determined by

the supreme court and the plea of *res judicata* was not sustained by the evidence.

"Sec. 58. The general rule is that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions; as, for instance, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate. Mr. Pierce in his standard work on railroads, discussing improvements made by a railroad company during an illegal possession of land, says: 'The laying of the rails or similar structures differs essentially from the ordinary transaction of placing fixtures on real estate, and is not governed by the same rules.' *(Pierce on Railroads, 219.)* It certainly is by law made the duty of a railroad company seeking to take and appropriate the lands of the owner to its own use to ascertain, in the manner provided by law, the compensation to which such owner is entitled and to make paymnet thereof before occupying the premises. Failing to do this, the company is a trespasser, but though such is the status of the company in the eye of the law, yet as was said by Chief Justice Brickell in *Jones vs. R. R. Co.*, 70 Ala., 227, "The neglect of the duty, the wrongful entry and possession, does not preclude the company from resorting subsequently to the proper proceeding for the acquisition of the land and of consequence availing itself of all the structures it may have placed thereon. (Justice vs. R. R. Co. 87 Pa. St., 28.; Secombe vs. R. R. Co., 23 Wall. 108.)"

R. W. Co. vs. Hays, 3 Tex. Ct. of App., C. C., Sec. 57-8.

"The railroad company was a trespasser in constructing its road upon land over which it had not acquired the right of way, but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass. The trespass committed is not involved in the determination of the due compensation. The continuing right of the company to secure

the right of way, in accordance with its charter, and the nature of its entry on the land annexing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold, and the rule of the common law, established when railroads were unknown, is not applicable."

R. R. Co. vs. Dickson, 63 Miss., 385.

"The appellee having entered upon lands without the consent of the owner, without instituting the necessary proceedings for the ascertainment of the compensation to which the owner was entitled and its actual payment in money as required by the constitution, was a trespasser. The owner could have supported an action of trespass against it or an action of ejectment, and could have enjoined it by bill in equity from the construction of its road, until the compensation was ascertained and paid. *Pierce on Railroads, 166-7; N. O. & Selma R. R. Co.*, and *Imm. Asso. vs. Jones*, at last term.

It is, as insisted by the counsel for the appellant, a maxim of the common law, that everything affixed to lands became a part of the freehold, subject to all its incidents and properties, and cannot be dissevered, or converted into personal property, without the act or consent of the proprietor of the lands. The maxim was never inflexible in its operation, and as far back as it may be traced, was subject to exceptions. *Van Ness vs. Pacard*, 2 Peters, 137; *N. C. R. R. Co. vs. Canton*, 30 Md. 347. These exceptions have multiplied with the increase in importance and value of personal property, and the varied necessities and exigencies of society. It is, nevertheless, true, generally, that if there is a tortious entry upon lands, and the tort-feasor makes improvements upon them, annexed to the soil for the better use and enjoyment of the lands, such improvements become a part of the realty. All property in them is vested in the proprietor of the soil, who is under no legal or equitable obligation to make compensation for them, or to suffer them to be dissevered and removed. 2 *Kent*, 338. It was the fraud or folly of the tort-feasor to build, to plant, or to sow, on the lands of another, without his consent. *Amos & Ferard on Fixtures, 10.*

This maxim seems to us incapable of any just application to parties standing in the relation of these parties, or to a proceeding of this character; and it

must not be overlooked, that they have corresponding rights and remedies. In this relation, they are placed by law. The rights of each party, the law distinctly defines; and the remedies each must pursue to secure and enforce their rights, are clearly prescribed. It was the right of the appellee to acquire the lands for the use of the road; a public, not a private use. Appropriate proceedings for its acquisition, if from any cause it could not be acquired by contract with the owner, the law prescribes. Just compensation for the land at the time of its taking, paid before or concurrently with its appropriation, was the right of the appellant. If there was an entry upon and appropriation of the lands without the consent of the owner, and without having the compensation ascertained and making payment of it, there were remedies to which he could have resorted, protecting himself, regaining his possession, and compelling the ascertainment and payment of the compensation. If he is negligent, if he stands by in silence, suffering the wrongful entry or continuance of possession under it, the construction of costly improvements, not necessary to the enjoyment of the freehold, inconvenient to his use and occupation, valuable to him only because he may dissever them, converting them again into personal property, and valuable only to the party making them for the uses to which they are dedicated, there is but little of equity in a claim that the measure of his compensation shall be increased by the value of the improvements, or that the time at which such compensation is to be estimated shall be varied. *Nemo debet locupletari ex alterius incomodo* is a maxim of the common law of as much force, though it may not be of as general application, as the maxim *quicquid plantatur solo, solo cedit.*

The duty rested upon the appellee before the taking and appropriation of the lands to have caused in the appointed mode the ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty the entry upon and possession of the lands was wrongful, no title to them was acquired and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellee from resorting subsequently to the proper proceeding for the acquisition of the lands, and of consequence availing itself of all the structures

it may have placed thereon. *Justice vs. N. Y. R. R. Co., 87 Penn. St., 28. Secombe vs. R. R. Co.,* 23 Wall., 108. Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and bywhich title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and, keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment of, or title to, the lands. There is also another distinguishing fact; the structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses which are the consideration for the grant to the appellee of corporate franchises and of the right, in the exercise of these franchises, to take and appropriate private property. *Justice vs. N .V. R. R. Co., Supra.; N. C. R. Co. vs. Canton, Supra; Morgan vs. N. V. Co.,* 39 Mich., 575; *Lyons vs. J. V. & M. R. R. Co.,* 42 Wis. 538. These elements of the case distinguish it from that of the trespasser entering upon lands, affixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty and which following the title to the soil, as one of its incidents, pass to the proprietor."

Jones vs. R. R. Co., 70 Ala., 230-1-2.

In Ohio the owner of lands in 1854 granted to a railroad company and its assigns, "the right of use of a strip of land, not exceeding one hundred feet wide, on and over the lot described below for a railroad;" and the writing evidencing this grant contained a further provision which indicated that the railroad company should have exclusive possession of the said one hundred feet. It will be seen

that by this grant the railroad company was to have exclusive and perpetual use and possession of the strip of land quite as much as the Atlantic & Pacific railroad under the grant by Congress. The only contemplated termination in either case would be the abandonment of the railroad or the termination of the life of the company. The Ohio company constructed its road and built a bridge across the Maumee river, putting on the said land eleven piers and abutments of stone masonry, and in the spring of 1855 the building of the railroad was abandoned, the stone in the piers and abutments being left on the premises. In 1867 the railroad company sued the owner of the land because he had prevented the removal of the stone in the piers and abutments, and it was contended on his behalf that these structures were fixtures and upon the abandonment of the railroad by the company remained a part of the realty and became the property of the owner of the land. The court held that the structures did not become a part of the realty, but belonged to the railroad company and could be removed without the consent of the owner of the land, putting this decision upon the ground that these structures were destined for use in connection with the railroad in its transportation of persons and property and not for the purpose of improving the realty. The following quotation from the opinion will indicate the reasoning of the court:

> "The use of the strip of land on which the piers were built was granted to the railroad company for the purpose of constructing part of a continuous line of railroad which it was authorized to build and operate. The piers were as much a part of the road as the bridges they were designed to support, or the rails and ties on the road. The use the road was intended to subserve and to which alone it was adapted, was the transportation of persons and property. The road and all its parts were merely accessory to this business, and were put on the land for this purpose, and not as accessories to the land over which the road was to pass. The part of the road built on the premises of the plaintiff in

error, disconnected from the other parts of the road, could not be operated, and would be useless as a railroad. Nor could it serve any useful purpose as an appurtenance to the land on which it was built."

Wagner vs. R. R. Co., 22 Ohio St., 577-8.

"The argument on behalf of the defendant on the first point is, that the plaintiffs, in constructing the railroad track, were trespassers, and that the track, being attached to the soil, became a part of the realty, and belonged to the owner of the land. Hence he claimed that its value ought to be included in the estimate of damages, in like manner as though the defendant had himself built the road. But this proposition cannot be maintained. Neither the constitution nor the statute contemplates that a person, whose land is taken in the exercise of the right of eminent domain, shall be entitled to anything beyond a 'just compensation.' He is to be paid the damage he actually suffers and nothing more. But, to hold that, in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over technical construction of it."

R. R. Co. vs. Armstrong, 46 Cal., 90-1.

In a Minnesota case, where a railroad company had wrongfully constructed its road over land of another, in subsequent condemnation proceedings the court held, on

broad grounds of equity, that the owner was not entitled to compensation for rails, ties, etc., but a concurring judge, dissenting from that line of reasoning, and referred to *Justice vs. R. Co., 87 Pa. St., 28*, as furnishing reasons "much more sound and satisfactory."

Grere vs. R. R. Co., 26 Minn., 68-71.

In a case in Mississippi, brought by the holder of a tax deed for the fractional thirty-eight acres in the S. E. ¼ of N. W. ¼, etc., against a railroad company which had wrongfully laid its track over a portion of the land, the court held that while the land covered by the right of way belonged to the holder of the tax title, yet the superstructure placed thereon by the railroad company did not go with the land upon which it was laid.

I. C. R. Co. vs. Le Blanc, 21 So., 761.

In the following cases, also, the courts have refused to consider such railroad improvements as becoming parts of the realty.

Morgan's Appeal, 38Mich., 679.
Ry. Co. vs. Dunlop, 47 Mich., 465.
Lyon vs. Ry. Co., 42 Wis., 544-5.
Daniel vs. R. R. Co. 41 Iowa, 53.
R. R. Co. vs. Morgan, 42 Kan., 23.

"The theory upon which the court below proceeded was, that the plaintiff, having entered upon the land without the consent of the owner, and without having instituted the necessary proceedings required by statute for the ascertainment of damages or compensation to which the defendant was entitled, and the payment of the same, was a trespasser; and that the rails, ties and other structures which the plaintiff had affixed to the lands in the mode ordinarily done for railroad purposes, became a part of the freehold and vested in

the proprietor of the soil. It is evident from the language of the instructions, that the court applied the common law maxim *quicquid plantatur solo, solo cedit,* with ancient rigor and strictness, and regarded the fact of attachment to the soil of structures as decisive of their character as fixtures, and the right of the owner of the land to them.

"The old rule, that all things annexed to the realty become a part of it, has been much relaxed, and several exceptions recognized; as where the intention is manifest to use the alleged fixtures in some employment distinct from the use of the soil or husbandry, or where the chattel has been affixed for the purposes of thade or the mechanical arts. In modern times, for the encouragement of trade, manufactories and transportation, and owing, no doubt, in part to the increased value and importance of personal property, many things are now considered as personalty which are attached to the soil. The necessities and convenience of an advancing civilization have demanded a relaxation of the strict rule, so that now attachment to the soil is only one of several conditions to help in determining whether a given thing belongs to the realty. The books indicate that various considerations have been applied by the courts in the determination of this question; and that few decisions, although involving fixtures of a similar character, can be considered of absolute authority for its disposition; but in the nature of things every case must depend more or less upon its own special facts and peculiar circumstances. *(Schouler on Personal Property, Sec. 117.)*

"In *Railroad Company vs. Deal, 90 N. C., 111,* the exceptions to the general rule and the reasons for them are clearly and distinctly stated by Merriam, J., who said: ' The general rule of law is that buildings and other structures erected on land for the better enjoyment of it become identified with it, part of, and go with the land, and the tenant has no right at any time to remove them. Anciently, the law was more strict in respect to making things erected upon and attached to the land, directly or ~~indirectly~~ indirectly, a part of the freehold, than in modern times. As civilization has advanced and trade and the mechanic arts and other industries have multiplied and increased in development, and correspondingly in their necessities and wants of reasonable convenience, there has been a growing relaxation of the strict rules of law men-

tioned in their favor. It is the policy of the law to encourage trade, manufactories and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery and all such things certainly intended and calculated to promote them, are treated, not as a part of the land, but as distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure. Hence, if a house or other structure is erected upon land only for the exercise of trade and agriculture, no matter how it may be attached to it, it belongs to the tenant, and may be removed by him during his term, and in some classes of cases, after it has ended; though the tenant after his term is over would, in going back upon the land to get his property, be guilty of a trespass and except in that respect the property would remain his. The exceptions to the general rule pointed out before are well settled, and the practical difficulty in any case arises in pointing out when the general rule or exception applies. The exception does not depend on the character of the structure or the thing erected, or whether it is built of one material or another, or whether it be set in the earth or upon it; but whether it is for the purpose of trade or manufacture, and not intended to become identified with and part of the land.'"

R. & N. Co. vs. Mosier, 14 Oreg., 520-1-2.

Of course in the present case, appellees now declare that the additions to the land were intended to be permanent and to enhance the value of the land itself, but the court will judge as to the nature of the additions as a matter of law, not by the present declarations of interested parties, but from all the facts concerning such additions. As was well said in a Massachusetts case, "The intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act."

Hopewell Mills vs. Savings Bank, 150 Mass., 521.

The improvements in question are not permanent, but constantly changing as they are taken up and replaced by others from time to time, and are also subject to lawful change by a change of location of the line of railroad, a sort of change which is frequently made on these long lines of railroads and which has been frequently made on this very road. It will not be pretended that for the purpose of straightening its line, of avoiding heavy grades, or providing better crossings of rivers, the company may not lawfully change its line, as it has done, and locate a new right of way through the public domain. There can be no doubt either that in case of such changes they could lawfully take up and remove from the abandoned portion of the land all of the rail, ties, bridges, culverts and telegraph lines for use elsewhere, and that the land thus abandoned would revert to the government.

The citation of these cases, and the argument based on them, may, at first glance, appear inconsistent with the position of appellant that the improvements in question are real estate, but this is not the fact. Appellant seeks to tax these "improvements" as "real estate" solely on account of the statutory definition of those terms contained in section 2807 of the Compiled Laws of New Mexico of 1884, which is printed with the opinion of the court. This is distinctly set out in appellant's briefs, and was also stated on the oral argument.

V.

In deciding the three cases the court has failed to notice a material difference between the case for Valencia county taxes and the cases for Bernalillo county taxes.

Cases numbered 106 and 170 were brought to recover taxes levied in the county of Bernalillo. The agreed statement of facts set out in the opinion of the court was made in case 106 only. Case No. 169 was brought for taxes levied in the county of Valencia, and, as appears by the record in that case at pages 80 to 84, 60.7 miles of the railroad run over land which was held in private ownership at the time of the grant. This fact is admitted by defendants, the mileage, however, being put at "about 58 miles." Attention was called to this difference in the original brief for appellant, but it does not appear to have attracted the attention of the court.

By reference to the act of congress it will be seen that the second section is the one which grants the right of way through public land, and is the one which contains the clause exempting the right of way from taxation. By every rule of construction the right of way exempted from taxation must be held to be the one granted by that name in the same section which contains the exempting clause, and that is only through the public land.

The right of eminent domain is conferred on the railroad company by section seven of the act of Congress, but in that section the phrase "right of way" is not used, but, after detailing the various steps which may be taken to acquire the land, it is declared that the company shall "thereupon acquire full title to the same for the purposes aforesaid."

It may well be argued that while Congress was willing to exempt from taxation any portion of the public domain which might be taken by the railroad company for its use, yet it was not willing to withdraw from taxation land already held in private ownership and subject to be taxed. The difference in the language of the two sections, the

careful avoidance of the term "right of way" as to the land acquired from private ownership, strongly countenances this view. Certainly there is enough in this difference in the language to admit of "reasonable contention" and to establish the existence of something more than a "well founded doubt" as to the intent of Congress to exempt the land held in private ownership at the time of the grant.

Certainly as to these sixty and seven-tenths miles in Valencia county, the decision of the supreme court of New Mexico is wrong and should be reversed to this extent, at least, and the case remanded for proper proceedings as to the tax levy upon this portion of the railroad. There is no difficulty about this as will be seen by reference to the record at pages 80-1, where it will be seen that this portion of the railroad was assessed separately from the other portion which runs over what was public domain at the time of the grant.

It is respectfully submitted that the foregoing statement shows that there is much involved in the decision of the cases as to which there has been no argument before the court, and some matters of importance which the court appears not to have noticed: and that the ends of justice will be best served by giving opportunity for a full presentation of the views of counsel as to such things, upon a rehearing.

F. W. CLANCY,
Counsel for Appellant.

NEW MEXICO *v.* UNITED STATES TRUST COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 106. Argued October 25, 26, 1898. — Decided December 5, 1898.

The provision in Sec. 2 of the act of July 27, 1866, c. 278, 14 Stat. 292, 294, which exempts from taxation within the Territories of the United States, the right of way granted by the act to the Atlantic & Pacific Railroad Company, operates to exempt from such taxation the land itself to the extent to which it is made by the act subject to such right of way and all structures erected thereon.

In so deciding the court does not question the rule of construction declared in *Vicksburg, Shreveport & Pacific Railroad* v. *Thomas*, 116 U. S. 665, and followed in *Yazoo &c. Railroad* v. *Thomas*, 132 U. S. 174; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279; *Keokuk & Western Railroad* v. *Missouri*, 152 U. S. 301; *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667; and *Covington &c. Turnpike Co.* v. *Sandford*, 169 U. S. 578, but rests the present decision simply on the terms of the statute.

This case was begun by the filing in the district court for Bernalillo County, in the Territory of New Mexico, by the District Attorney for the Territory, of an intervening petition on behalf of the Territory praying for an order against the receiver of the Atlantic and Pacific Railroad Company, requiring him to pay the amount of taxes claimed to be due upon the improvements on the right of way of said railroad company in the county of Bernalillo, and upon station houses and other improvements at seven different stations in said county. The taxes claimed were for the years 1893, 1894 and 1895.

The case was submitted upon the following agreed statement of facts:

"For the purposes of the hearing to be had upon the intervening petition of the Territory of New Mexico, in the above-entitled cause, and answers thereto of C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, and the United States Trust Company, it is hereby stipulated and agreed, by

and between said above-named parties, that the following facts shall be accepted and received by the judge or court in determining the questions involved as the facts in the case.

"That on and prior to January 1, 1892, the Atlantic and Pacific Railroad Company, under the provisions of its charter, definitely located its line of road and right of way through Bernalillo County, which said right of way so located involved all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations. That upon said right of way so located through the city of Albuquerque, in said county, was definitely located necessary ground for station buildings, work shops, depots, machine shops, side tracks, turn tables and water stations; and there was also located upon said right of way at the Atlantic and Pacific Junction, at Chaves or Mitchell, at Coolidge, at Wingate, at Gallup and at Manuelito, necessary ground for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations.

"That thereafterwards and prior to 1893 there was built and constructed upon said right of way by the Atlantic and Pacific Railroad Company from a point of junction with the Atchison, Topeka and Santa Fé Railroad Company at Isleta, fifteen miles south of Albuquerque, a railroad along said right of way, from said junction point to the Colorado River, in the Territory of Arizona; that the Atlantic and Pacific Railroad Company has, under an agreement with the Atchison, Topeka and Santa Fé Railroad Company, occupied and used the tracks of the last named company between the junction of the two railroads at Isleta and the city of Albuquerque as and for the railroad of the Atlantic and Pacific Railroad Company to the extent that its business required the use and operation of such railroad for itself; or, in other words, under contract between the two companies the railroad of the Atchison, Topeka and Santa Fé Railroad Company through the city of Albuquerque to the junction at Isleta, a distance of about fifteen miles, is jointly used by the two railroad companies; said railroad running through the reservations for machine shops, etc., aforesaid, of the Atlantic and Pacific Railroad Company at

Albuquerque; that the right of way so located by the Atlantic and Pacific Railroad Company and upon which it built its railroad, as aforesaid, runs through Bernalillo County, and is situated in Bernalillo County as follows:

"Commencing at the A. & P. Junction referred to, it runs thence in a westerly direction 4 miles 3780 feet to the division line between Bernalillo County and Valencia County, and then after crossing a portion of Valencia County at a point known as Station 5247 it again runs through Bernalillo County 68 miles and 44 feet to the west line of the county of Bernalillo, being the west line of the Territory of New Mexico; which said right of way, outside of the reservation for station grounds, etc., was located, and is of the width of 200 feet, being 100 feet on each side of the centre of the railroad track located thereon.

"That in due time the former receivers of the property of the Atlantic and Pacific Railroad Company appointed by this court returned to the assessor of Bernalillo County as property belonging to said railroad company, taxable in said county, certain property, which was and is described in said returns as follows, to wit:

"List of personal property belonging to, claimed by, or in the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western Division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico.

"The line of its road running through the counties of Bernalillo and Valencia in said Territory of New Mexico; thence through the counties of Apache, Navajo, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line, and its terminus at Mojave, in said county of Kern, a total distance of 805.86 miles, the total mileage of said line owned by said company in said Territory of New Mexico being 166.6, of which 73.142 are in Bernalillo County, and 93.458 miles are in Valencia County.

"And the receivers of the property of said company,

make a full report of all of its personal property as follows, to wit:

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars, and all other equipments owned, possessed or used by said receivers or said company upon the entire line aforesaid	$452,960
Track tools, and all other personal property not having its situs or domicil in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and material, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito	78,000
Personal property within the city limits of Albuquerque	200,000
Personal property within the city limits of Gallup	5,000

"That the above and foregoing was all the property returned for taxation in Bernalillo County by said receivers or by the railroad company itself; and that the same was made as the assignment of the property of said company subject to taxation in said county for the year A.D. 1895; that the county assessor of Bernalillo County in the year 1895, under the direction of the board of county commissioners of said county, placed on the assessment roll an assessment of property against the Atlantic and Pacific Railroad Company for the year 1893. A true and correct copy of the assessment roll showing such assessment so placed thereon is filed with this as a part hereof, and as 'Exhibit 1,' which said exhibit shows the taxes levied, together with the values and penalties. That at the time the said assessor, under the instructions of said board, placed upon said assessment roll certain property claimed to be taxable property belonging to said railroad company, which was omitted from taxation for the year 1894. A true and correct copy of the assessment so made is shown by 'Exhibit 2,' herewith filed and made a part hereof.

"That the said assessor at the same time placed upon said

assessment roll property claimed to have been omitted and belonging to said company for the year 1895, a true and correct copy of which said assessment roll, with said last-named assessment placed upon it, is shown by 'Exhibit 3,' hereto attached and made a part hereof and filed herewith.

"That these exhibits show precisely the descriptions of property entered by the assessor, the penalties added, and the values and also the taxes levied thereon. 'Exhibit 3' also shows the description of the property as returned by the receivers.

"That all the property so placed upon the assessment roll by the assessor, outside of that returned by the receivers, was placed upon said assessment roll without the knowledge or consent of the receivers, or of said railroad company; that the entire property placed upon the assessment roll by said assessor, outside of the property returned by the receivers, constituted and constitutes an actual part and portion of the roadbed and railroad track thereon situated on the right of way of the Atlantic and Pacific Railroad Company in Bernalillo County, in the Territory of New Mexico, and constitutes the railroad used and occupied by the Atlantic and Pacific Railroad Company under its charter and in accordance with the provisions thereof; and the machine shops, station buildings, water tanks, section houses and other buildings of like character connected with and a part of the machinery used in the operation of said railroad; that each and every item of property described in the assessments so placed upon the said assessment roll, outside of the property returned by the receivers, is property that is actually and permanently attached to the right of way and station grounds of the Atlantic and Pacific Railroad Company, and constitutes an actual part and portion of the superstructure placed upon said right of way by said railroad company for its railroad and for its machine shops, turn tables, side tracks, switches, water tanks, station buildings and other buildings of the same class and character actually used and needed in the operation of said railroad, and that no part of the same was, at the time of the placing of said assessment upon said assessment rolls by the

assessors, detached from the actual right of way and station grounds of said railroad company; but, on the contrary, was firmly affixed thereto; that it was described as it was by the assessor in placing the same upon the assessment roll for the purpose of escaping the exemption from taxation contained in the second section of the act of Congress approved July 27, 1866, known as the charter of the Atlantic and Pacific Railroad Company, the assessor desiring to assess everything placed on the right of way separate from the right of way, no matter how permanently attached and affixed to the right of way.

"That during the year 1893 there were no receivers in possession of said property, and that said railroad was being operated by the railroad company itself, and, if any property was omitted to be returned for taxation which ought to have been returned to the assessor of Bernalillo County, it was the fault and neglect of the railroad company itself, and not the fault and neglect of the receivers afterwards appointed.

"That at Albuquerque, upon the reservations and station grounds, there were situated the largest machine shops of the said railroad company, the general office building and such buildings as pertain to the headquarters of a railroad company; said buildings and reservation constitute the headquarters of the Western Division of the Atlantic and Pacific Railroad Company, and, since the appointment of receivers, of the receivers operating the same.

"That the assessor, in placing each of these three assessments upon the assessment rolls as stated, added to the actual value of the property one fourth of such value, as a penalty for the failure on the part of the receiver to return such property for taxation.

"That in 1893 the railroad company, and in 1894 and 1895 the receivers, omitted all property that was firmly and fixedly attached to the right of way of said railroad company and to station grounds, under the honest belief that the same constituted a part of the right of way and was exempt from taxation."

Subsequently, the case came on to be heard, upon the intervening petition of the Territory and the answer thereto

of the United States Trust Company and of the receiver, C. W. Smith, and the agreed statement of facts. Upon the hearing the judge of the district court ordered the receiver to pay to the treasurer of the county of Bernalillo the sum of forty-three thousand two hundred and fifty-four dollars and seventy cents ($43,254.70), the amount ascertained by a special master to be the aggregate of the taxes levied upon the additional assessments and penalties. An appeal was taken from this order by the United States Trust Company, and also by the receiver, C. W. Smith, who had obtained from the court permission to take such an appeal. The order appealed from was reversed upon hearing before the Supreme Court of the Territory, the court determining that the additional assessments placed upon the rolls were illegal and void. An application was made for a rehearing, which the court denied, and an appeal was taken to this court.

The sections of the act of July 27, 1866, c. 278, 14 Stat. 292, with which we are concerned, are inserted in the margin;[1] also sections 2807, 2822, 2834 and 2835 of the

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[1] SEC. 1. . . . And said corporation is hereby authorized and empowered to lay out, locate and construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River; thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian River eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth. * * *

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction

of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations, and the right of way shall be exempt from taxation within the Territories of the United States. * * *

SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers. * * *

SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations and watering places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. * * *

SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-

outs, standing places for cars, depots, station houses or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its roadbed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners who may be appointed upon application by either party to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners in their assessment of damages shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. * * *

SEC. 8. *And be it further enacted*, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-eight.

SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road.

SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

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SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other

Counsel for Appellant.

Compiled Laws of 1884 of New Mexico relating to taxation.[1]

Mr. F. W. Clancy for appellant. *Mr. Felix H. Lester* and *Mr. Thomas N. Wilkerson* were on his brief.

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purposes, Congress may at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act.

[1] TITLE 41. CHAPTER 1.

2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

First. The term "real estate" includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto and improvements.

Second. The term "improvements" includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired to said land or not.

Third. The term "personal property" includes everything which is subject of ownership, not included within the term "real estate."

Fourth. The term "credit" includes every claim and demand for money, or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries, or payments expected, for services to be rendered are not included in the above term.

2822. The assessor is required, between the first day in March and the first day in May of each year, to ascertain the names of all taxable inhabitants and all property in his county subject to taxation. To this end he shall visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately:

First. All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

Second. The county in which such property is situated, or in which it is liable to taxation.

Third. A description by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewellery, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail.

Mr. Victor Morawetz and *Mr. C. N. Sterry* for appellees. *Mr. E. D. Kenna* and *Mr. Robert Dunlap* were on their brief.

Mr. Justice McKenna, after stating the case, delivered the opinion of the court.

The right of way is granted to the extent of two hundred feet on each side of the railroad, including necessary grounds for station buildings, workshops, etc. What, then, is meant by the phrase "the right of way"? A mere right of passage, says appellant. *Per contra*, appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was granted, that all that was attached to it became part of it and partook of its exemption from taxation.

To support its contention, appellant urges the technical meaning of the phrase "right of way," and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context, and the intention of the legislature otherwise indicated. Examining the statute, we find that whatever is granted is exactly measured as a physical thing — not as an abstract right. It is to be two hundred feet wide, and to be carefully broadened so as to include grounds for the superstructures indispensable to the railroad.

The phrase "right of way," besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes

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2834. On or before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headings, alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value as hereinbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll all property assessed to "unknown owners" shall be entered.

2835. Each tract of land shall be valued and assessed separately except when one or more adjoining tracts are returned by the same person, in which case they may be valued and assessed together

and another thing in a grant to a railroad for public purposes — as different as the purposes and uses and necessities respectively are.

In *Keener* v. *Union Pacific Railway*, 31 Fed. Rep. 126, 128, Mr. Justice Brewer defined the words "right of way" as follows: "The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross; a right of crossing; a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed."

Mr. Justice Blatchford said in *Joy* v. *St. Louis*, 138 U. S. 1, 44: "Now the term 'right of way' has a twofold signification. It is sometimes used to describe a right belonging to a party, a right of passage over any tract; *and it is also used to describe that strip* of land which railroad companies take upon which to construct their roadbed." That is, the land itself — not a right of passage over it. So this court in *Missouri, Kansas & Texas Railway* v. *Roberts*, 152 U. S. 114, passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way two hundred feet wide, decided that it conveyed the fee. The effect of this decision is attempted to be avoided by saying that the distinction between an easement and the fee was not raised. The action was ejectment, and was brought in Kansas, and under the law of that State title could be tried in ejectment. Title was asserted by Roberts, who was plaintiff in the state court, and this court evidently considered it involved in the case. The language of Mr. Justice Field, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.

Washburn in his work on Easements, on p. 10, says: "Whether the thing granted be an easement in land or the land itself may depend upon the nature and use of the thing granted." To sustain this view the learned author cites *Jamaica Pond Aqueduct Corporation* v. *Chandler*, 9 Allen, 159. In that case the court said: "Whenever a grant is made of a

right or easement in lands which fall within the class sometimes described as 'non-continuous' — that is, where the use of the premises by the grantee for the purpose designated in the deed will be only intermittent and occasional, and does not embrace the entire beneficial occupation and improvement of the land — the reasonable interpretation is, that an easement in the soil, and not the fee, is intended to be conveyed. Among the most prominent of this class of easements is a way." An ordinary way, of course, the court meant, one the use of which would be non-continuous — only intermittent and occasional; but a way not of that character, whose use would be continuous, not occasional, and which would embrace the entire beneficial occupation and improvement of the land, might require the fee for its enjoyment — certainly would require more than a mere right of passage. "Unlike the use of a private way — that is, discontinuous — the use of land condemned by a railroad company is perpetual and continuous." *New York, Susquehanna & Western Railroad* v. *Trimmer*, 53 N. J. L. 1, 3.

But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.

In *Smith* v. *Hall*, 72 N. W. Rep. 427, the Supreme Court of Iowa says, speaking of the right of way of a railroad: "The easement is not that spoken of in the old law books, but is peculiar to the use of a railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by non-user. The exclusive use of the surface is acquired and damages are assessed on the theory that the easements will be perpetual; so that ordinarily the fee is of little or no value unless the land is underlaid by a quarry or mine."

"The right acquired by the railroad company, though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574, 580.

In *Southern Pacific* v. *Burr*, 86 California, 279, the Supreme Court of California sustained an action of ejectment for land constituting a part of the right of way granted to the Central Pacific Railroad by the act of July 1, 1862, by language similar to the grant in the case at bar.

Distinguishing the case from *Wood* v. *Truckee Turnpike Co.*, 24 California, 474, in which it was held that "a road or right of way is an incorporeal hereditament, and ejectment is maintainable only for corporeal hereditaments," the court said: "We think that case plainly distinguishable from this. Here there was a special grant of a right of way two hundred feet in width on each side of the road. This grant is a conclusive determination of the reasonable and necessary quantity of land to be dedicated to the public use and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the four hundred feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks, or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so." The court quoted and approved the views expressed in *Winona* v. *Huff*, 11 Minnesota, 119, that for a mere easement perhaps an action of ejectment would not lie; but wherever a right of entry exists and the interest is tangible so that possession can be delivered, an action of ejectment will lie. The same distinction was made in *New York, Susquehanna & Western Railroad* v. *Trimmer*, *supra*, and the court said that if the interest of the railroad company was a naked right of way it would constitute no such right of possession of the land itself as would sustain the action; for such a right would be an incorporeal one upon which there could be no entry, nor could possession of it be given under an *habere facias possessionem*. In this case it was held that the interest taken by the railroad was not an easement.

The interest granted by the statute to the Atlantic and

Pacific Railroad Company, therefore, is real estate of corporeal quality, and the principles of such apply. One of these, and an elemental one, is that whatever is erected upon it becomes part of it. There are exceptions to the principle, but as we are not concerned with them, we need not state them. Applications of the principle to railroads are illustrated by the decisions of this court and by those of other courts. As to rails put down against him from whom purchased, *Galveston Railroad* v. *Cowdrey*, 11 Wall. 459; *United States* v. *New Orleans Railroad*, 12 Wall. 362; *Thompson* v. *White Water Valley Railroad*, 132 U. S. 68; even though the contract of purchase provided that the property should remain that of the vendor and he have a right to remove the same, *Porter* v. *Pittsburg Bessemer Steel Co.*, 122 U. S. 267, and cases cited; in determining the relation of the rails to the right of way, *Joy* v. *St. Louis*, 138 U. S. 1. In this case Mr. Justice Blatchford said: "The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way." See also *Palmer* v. *Forbes*, 23 Illinois, 301; *Hunt* v. *Bay State Iron Co.*, 97 Mass. 279; *New Haven* v. *Fair Haven & Westville Railroad*, 38 Conn. 422.

The principle has also illustrations in cases of taxation. *People* v. *Cassity*, 46 N. Y. 46; *Appeal Tax Court of Baltimore City* v. *The Baltimore Cemetery Co.*, 50 Maryland, 432; *Osborne* v. *Humphrey*, 7 Conn. 335; *Parker* v. *Redfield*, 10 Conn. 490; *Lehigh Coal & Navigation Co.* v. *Northampton County*, 8 W. & S. 334; *Chicago, Milwaukee & St. Paul Railway* v. *Crawford*, 48 Wisconsin, 666; *Richmond* v. *Richmond & Danville Railroad*, 21 Gratt. 604; *Mayor &c. of Baltimore* v. *Baltimore & Ohio Railroad*, 6 Gill. 288; *Osborn* v. *N. Y. & N. H. Railroad*, 40 Conn. 491; *Richmond & Danville Railroad* v. *Alabama*, 84 N. C. 504; *Worcester* v. *Western Railroad Corporation*, 4 Met. 564.

It is urged, however, that the rule of construction declared in *Vicksburg, Shreveport & Pacific Railroad* v. *Dennis*, 116

U. S. 665, and the cases there cited and approved, and repeated in *Gazoo &c. Railroad* v. *Thomas*, 132 U. S. 174; *Wilmington & Weldon Railroad* v. *Alsbrook*, 146 U. S. 279, 294; *Keokuk & Western Railroad* v. *Missouri*, 151 U. S. 301, 306; *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667, and *Covington &c. Turnpike Co.* v. *Sandford*, 164 U. S. 578, determines in favor of appellant's contention. That we do not think so is probably sufficiently indicated, but we cite the cases to preclude the thought that they have been overlooked, or that the rule announced by them is questioned. Indeed, we regard it as salutary, and not impaired by our decision which simply rests on the terms of the statute.

The decree is

Affirmed.